

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:07-cr-10102-MLW-1

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5 UNITED STATES OF AMERICA

6 vs.

7 JUAN OCASIO

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11 For Hearing Before:
12 Chief Judge Mark L. Wolf

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14 Motion to Suppress

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17 United States District Court
18 District of Massachusetts (Boston.)
19 One Courthouse Way
Boston, Massachusetts 02210
Friday, June 5, 2009

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1 P R O C E E D I N G S

2 (Begins, 9:45 a.m.)

3 THE CLERK: This is Criminal Matter 07-10102,
4 United States vs. Juan Ocasio, et al. The Court is in
5 session. You may be seated.

6 THE COURT: Good morning. Would those
7 counsel -- oh, I'm sorry. We'll administer the oath to
8 the interpreter.

9 (THE INTERPRETER, MR. GEOFFRION, sworn.)

10 THE COURT: Would counsel please identify
11 themselves for the record.

12 MR. FISHER: Good morning, your Honor. Robert
13 Fisher on behalf of the United States.

14 MR. FICK: Good morning, your Honor. William
15 Fick for Mr. Ocasio. I'll also note that his wife,
16 Ms. Weakley, and my investigator, Mr. Meadows, are
17 here. I could ask them to step out if the Court would
18 like them to be sequestered for this as well?

19 THE COURT: I don't think that's necessary.

20 MR. FICK: Thank you.

21 MR. GARRITY: Good morning, your Honor. Paul
22 Garrity for Johan Farias.

23 THE COURT: Mr. Fisher, both Acting United
24 States Attorney, Loucks, and Mr. Lang signed, with you,
25 the request for the dismissal of charges against

1 Mr. Ocasio. Do you know where Mr. Loucks is? I have
2 some questions for him.

3 MR. FISHER: Your Honor, I can report that he
4 has a family -- I believe a family high school
5 graduation this morning.

6 THE COURT: And Mr. Lang?

7 MR. FISHER: My understanding is that Mr. Lang
8 has a previously scheduled contested hearing in front of
9 Judge Young.

10 THE COURT: Okay. Well, I'll order now that
11 the government order the transcript of this proceeding.
12 In my order yesterday, I directed the DEA Special Agent,
13 O'Shaughnessy, be present basically reiterating what I
14 ordered on May 27th. Is he here and outside the
15 courtroom?

16 MR. FISHER: Your Honor, he is here and he is
17 outside the courtroom.

18 THE COURT: And I also ordered that if the
19 witness referenced in the statement filed yesterday:
20 "The government is seeking dismissal in part because
21 information it learned of in May, 2009 fatally
22 undermines the credibility of one of its essential
23 witnesses," does not refer to Special Agent
24 O'Shaughnessy, the referenced witness shall also be
25 present if he or she is employed by the government. Is

1 the referenced witness Mr. O'Shaughnessy?

2 MR. FISHER: Your Honor, that is not a
3 reference to Special Agent O'Shaughnessy.

4 THE COURT: Okay. And is it somebody employed
5 by the government?

6 MR. FISHER: This person is not employed by
7 the government.

8 THE COURT: Is it the person you were
9 referring to in the May 27th hearing in the transcript
10 at Page 24?

11 MR. FISHER: Yes, your Honor.

12 THE COURT: Okay. We're going to get to that
13 then. Thank you.

14 I think, as in many matters, it's useful to try to
15 assure we have a clear and common sense of the
16 background of this.

17 Last week, on May 27th, I held a hearing to learn
18 about this case and to schedule a hearing on
19 Mr. Ocasio's two motions to suppress. In preparing for
20 that hearing, I didn't realize that there was no
21 government opposition filed to the motion to suppress
22 the identification, so I read the motion to suppress the
23 identification carefully and I became concerned, as I
24 said last week, that Special Agent O'Shaughnessy's DEA 6
25 report concerning the identification, or his first

1 report, stated that the two cooperating witnesses were
2 shown a photo array "separately."

3 Mr. Fisher's much later letter to the Assistant --
4 well, to Mr. Ocasio's counsel disclosed that
5 Mr. O'Shaughnessy showed the two cooperating witnesses
6 two photo arrays simultaneously when they were sitting
7 next to each other at a table. The government also,
8 later, and much belatedly, disclosed that one of the
9 cooperating witnesses saw Mr. Ocasio in the lockup in
10 the courthouse before making the identification, a fact
11 important to the motion to suppress.

12 As I said, on May 27th, I was and remain concerned
13 about the integrity of the investigation of this case.
14 I raised issues of whether misconduct occurred and if so
15 whether this case could, as a matter of law, and should,
16 as a matter of fact, be dismissed as an exercise of the
17 Court's supervisory powers to deal with a persistent
18 pattern of outrageous misconduct. The legal issue was
19 left open by the First Circuit in **Santana**, as I noted in
20 my May 18th decision in **United States vs. Jones**.

21 At the May 27th hearing, I also identified various
22 ways in which the Assistant U.S. Attorney, Mr. Fisher,
23 had not properly performed his duties to obtain all
24 material exculpatory information in the possession of
25 the agencies involved in the investigation. I expressed

1 the view, that hasn't changed, that Mr. Fisher engaged
2 in a well-meaning effort to discharge his duties.
3 However, Mr. Fisher did not know which agencies,
4 particularly state or local agencies, were involved in
5 the investigation. Therefore, he did not ask all of
6 them for exculpatory information, as required by the
7 Supreme Court's decision in **Kyles**, by Local Rule 116.8
8 of this court, and as instructed by the U.S. Attorney's
9 Manual, Section 9-5001(v)(2).

10 In addition, the prosecutor did not obtain and
11 review for exculpatory information the notes of the
12 agents and officers involved in the investigation.
13 Local Rule 116.9 requires the preservation of notes for
14 this purpose, among others.

15 In my May 18, 2009 **Jones** decision, which the
16 prosecutor represented that he read, it arose out of the
17 failure to disclose exculpatory information and notes.
18 But the prosecutor did say that there was a DEA report
19 of an interview of a percipient witness being prepared
20 that would have to be turned over as exculpatory
21 evidence.

22 On May 27th, I scheduled a hearing on the motions
23 to suppress for today, June 5. I ordered the government
24 to produce all material exculpatory evidence by June 1.
25 And I ordered that Mr. O'Shaughnessy attend the hearing

1 today and be prepared to testify.

2 On June 4, yesterday, in the afternoon, the
3 government filed a document captioned "Dismissal of Juan
4 Ocasio From All Counts of the Indictment Pursuant to
5 Rule 48(a)." In support of the requested dismissal,
6 which the government recognized requires leave of court,
7 the government stated that, quote: "Both because it
8 agrees that the show-up identification, photo-spread
9 identification and any prospective in-court
10 identification of the defendant by either of the two
11 witnesses referenced in the defendant's motion to
12 suppress should be suppressed and because it learned of,
13 in May of 2009 -- and because information it learned of,
14 in May of 2009, fatally undermines the credibility of
15 one of its essential witnesses, the Government does not
16 believe that it can now prove the charge, the offenses
17 beyond a reasonable doubt. Accordingly, further
18 prosecution of the defendant in this matter is contrary
19 to the public interest and dismissal of the charges is
20 in the interest of justice."

21 I, upon receiving that submission yesterday
22 afternoon, promptly issued an order. It says in part
23 that: "As the government recognizes, Federal Rule of
24 Criminal Procedure 48(a) requires leave of court for a
25 dismissal before trial. The government has not stated

1 whether the proposed dismissal is intended to be with
2 prejudice to any future state prosecution nor has the
3 Court been informed of whether the defendant, Juan
4 Ocasio, consents to the dismissal on the terms the
5 Government proposes. The Court must consider these
6 issues and also whether the motion is prompted by
7 considerations clearly contrary to the public interest
8 in deciding whether to allow the government to dismiss
9 the charges against Ocasio under Rule 48(a)". And that
10 statement quoted, in part, the Supreme Court's decision
11 in **Rinali vs. United States**, 434 U.S. 22 at 30, Note 15.

12 Essentially I understand **Rinali** and the related
13 cases to require that I be satisfied that the defendant
14 does not have to be protected from prosecutorial
15 harassment in connection with the dismissal. I also
16 have to be satisfied that the dismissal will not be
17 clearly contrary to the public interest.

18 The dismissal, in this case, will free a person
19 the government alleges was dealing in large quantities
20 of drugs. It will put him back on the street. I have
21 to -- I have a responsibility to assure that the charges
22 are not being dismissed to cover up government
23 misconduct that might be further exposed if a hearing on
24 the motions to suppress proceeds today as scheduled. So
25 I'd like the government to amplify and explain the

1 reasons that the charges should be dismissed.

2 MR. FISHER: Your Honor, thank you. And just
3 to clarify the record, you asked me whether the other
4 individual not employed by the government was the one
5 mentioned on Page 24 of the previous transcript from May
6 27th, and he is not that person. That person mentioned
7 in that page is virtually a person that I, myself,
8 tracked down, out of state, to interview to try to
9 corroborate the information given by the previous
10 cooperator, who is represented in with the co-defendant
11 in this case.

12 THE COURT: Sorry. Who is represented?

13 MR. FISHER: Represented by Attorney Garrity.
14 That person is the person I was trying to corroborate
15 the information of.

16 THE COURT: All right. What's that person's
17 name?

18 MR. FISHER: It's Johan Farias. Johan Farias.

19 THE COURT: Johan Farias?

20 MR. FISHER: The information I was trying to
21 corroborate, in which led to this dismissal, was
22 information I gained in investigating what Mr. Farias
23 informed the government about what Mr. Ocasio had done.

24 THE COURT: And Mr. Farias was going to be a
25 witness in this case?

1 MR. FISHER: Correct, at one point. And just
2 to -- the time line of this case, I think, is
3 important.

4 As the Court knows, I filed my appearance in the
5 case in February of 2008. When I received the case, and
6 my brother, Attorney Fick, and Attorney Garrity, I'm
7 sure, can address, discovery was essentially complete.
8 I focused on -- when I inherited this case, on the
9 motions that were soon to be scheduled and tried to
10 further investigate the underlying allegations in the
11 case, how we were going to prove it at trial. And,
12 again, as I said at the previous hearing, that's not an
13 excuse for me not making sure that all notes were in my
14 possession or for speaking to every task force agent,
15 but that's my explanation, that is what happened, or my
16 understanding as to what was there when that discovery
17 was complete.

18 I contacted my brother, Attorney Fick, and
19 Attorney Garrity and tried to make sure that they had
20 some discovery that had been, as my brother termed it,
21 "loose ends," such as disks that couldn't be read, etc.
22 I was told that it may not have been provided. And I
23 worked vigorously to make sure they got that. And I'm
24 sure they can communicate that to the Court. And then I
25 turned my attention towards these motions to suppress,

1 in particular to the two -- the first two cooperators,
2 Jorge and Lorez Santos. They were indicted in this
3 case. They were in the car when it was bringing 15
4 kilos across the country back in February of '07. They
5 fled in Judge O'Toole's session.

6 Shortly after they fled -- they fled to Mexico.
7 Once they fled to Mexico, my -- I realized that they
8 were probably going to be of no use to me at trial
9 because they fled and violated their agreement and
10 because I understood that -- and, you know, I admitted
11 this in the letter that I drafted to my brother, that
12 there was a problem with the photo array, that I was not
13 going to be relying on that at trial. So therefore my
14 focus turned to how was I to --

15 THE COURT: And, again, because I'm going to
16 order that Mr. Loucks read this transcript, that letter
17 stated that you wish to "clarify" the DEA 6. In my view
18 it's not a "clarification," it's a "correction". That
19 when the DEA 6 says they're interviewed "separately,"
20 it's inconsistent, completely inconsistent, not
21 ambiguous or unclear, but inconsistent, with the
22 assertion -- well, with the fact that they were sitting
23 next to each other and they were doing the photo
24 identification simultaneously. In fact, it's
25 inconsistent with the directions given to DEA agents

1 that Mr. Fick appended to his motion to suppress.

2 The directions state: "Where there is more than
3 one witness, each should view the photos," and then in
4 all caps, "SEPARATELY, NOT IN EACH OTHER'S PRESENCE."
5 I'm personally skeptical about whether if a DEA agent
6 was instructed on how to conduct an identification and
7 indeed was using a form that had that on the back, that
8 he could represent, candidly, honestly, that the
9 identifications were separate when he obviously knew
10 that the two cooperating witnesses were in each other's
11 presence. To me, you "corrected" the record, you didn't
12 "clarify" it. I said that last week and I reiterate it.

13 MR. FISHER: Your Honor, and just to be clear,
14 however, I did want to alert my brother to that.

15 THE COURT: And you did. You did and that was
16 your duty. I'm not going to say it's commendable. Just
17 as we expect people who are let out on pretrial to obey
18 the conditions of their pretrial release, there's a
19 reasonable expectation that prosecutors will know and
20 discharge their duties to disclose material exculpatory
21 evidence. So you had a duty to disclose it and you did
22 it.

23 MR. FISHER: So after the first two
24 cooperators fled and I realized there would possibly be
25 problems with the identification, I then -- the first

1 order of business after I took control of the case was
2 the motion to suppress.

3 Once my brother filed his motion to suppress the
4 photo array, of the tainted photo array and application,
5 I reviewed that and I realized that in there there was a
6 paragraph in which he mentioned the possibility that his
7 client was seen by at least one of the cooperators,
8 maybe both, in the lockup. So I then tried to -- I then
9 turned my attention to investigating that and getting to
10 the bottom of that.

11 Now, again, that occurred before I was even with
12 the office and well before I inherited the case. And I
13 did get to the bottom of that. And I discovered a
14 report, and upon which I discovered it, I turned it over
15 to my brother immediately and we had discussions about
16 it.

17 THE COURT: That report, I think, wasn't
18 marked at the last hearing and it should be made part of
19 the record today. That's a report that was created 8
20 months after the event in the lockup, right?

21 MR. FISHER: My understanding, your Honor, the
22 event in the lockup occurred on February 22nd of '07.
23 The date of the report, which I eventually turned over
24 to my brother, was a date in late October of '07. So,
25 yeah, approximately 8 months. Yeah, that's correct.

1 THE COURT: And you turned it over 10 months
2 later?

3 MR. FISHER: Well, I filed my appearance --
4 correct. I filed my appearance in February and we -- we
5 had many discussions about what other discovery he was
6 still owed. I provided that to him. He filed a
7 motion. I read that motion and I said, "What is this
8 issue?" That was the first time I realized that that
9 had been an issue and I remedied it.

10 THE COURT: And I asked you last week, and
11 perhaps you know more now, but I asked you whether DEA
12 agents have an obligation to promptly prepare, perhaps
13 within a specified time period, DEA 6 reports regarding
14 material events and information.

15 MR. FISHER: My understanding is that there is
16 no strict policy saying that it has to be done within 7
17 or 10 days or whatever, but if there's a significant
18 event, that it should be memorialized in a DEA 6. But
19 there's no actual time frame.

20 THE COURT: Have you looked at the manual?

21 MR. FISHER: I have not myself looked at the
22 manual.

23 THE COURT: All right. Good. I'm directing
24 you to look at the manual and report to me on Tuesday
25 what it provides on this point, and if it's not a

1 confidential document, to provide the excerpt of it.

2 MR. FISHER: So once I dealt with that, then I
3 moved on to the stage of --

4 THE COURT: Have you asked Mr. O'Shaughnessy
5 why he didn't include that information in the earlier
6 DEA 6 concerning the identification and why he prepared
7 the report in October?

8 MR. FISHER: Well, when this issue arose, I
9 asked him if there was a report, and this was right
10 after the motion was filed, and I'm saying June or
11 possibly -- I believe it was late June of '08. I mean,
12 I asked him if there was a report reflecting this? And
13 he said he believed there was. And I believe the next
14 day, or within one or two days, I then received an
15 e-mail copy of that report, which I provided to my
16 brother.

17 I admit -- I cannot tell you what -- why it took
18 six months. I wasn't in the office for a large portion
19 of that time. It wasn't my case up to when it -- I
20 wasn't living it.

21 THE COURT: Where did you come to this office
22 from?

23 MR. FISHER: I worked at the Attorney
24 General's Office in Massachusetts prior to coming here.

25 What I did do, after that motion was filed, was

1 respond to them, and then the next issue at hand was how
2 am I going to prove this case?

3 As the Court knows, the person I mentioned
4 earlier, who was represented by Mr. Garrity, did sign an
5 agreement, a cooperation agreement, and gave hours of
6 proffer statements, and in which created pages upon
7 pages of reports. I provided all of those to my
8 brother, Attorney Fick.

9 Because there was so much information provided by
10 this individual, which was very helpful to this
11 defendant, Mr. Ocasio, because -- and essentially if
12 Farias was going to testify at the trial, I was not
13 going to need the other two cooperators because he can
14 obviously identify --

15 THE COURT: Well, let me ask you a question.
16 Have the Santoses -- I think you told me they fled to
17 Mexico?

18 MR. FISHER: They did, your Honor.

19 THE COURT: Have they been apprehended?

20 MR. FISHER: They were. They turned
21 themselves back in at the border. I believe Jorge, the
22 husband, came in -- he came back and -- he turned
23 himself in back at the border, I believe, about three
24 weeks after he fled. His wife was gone a bit longer, I
25 want to say an additional three or four weeks. She

1 eventually turned herself back in, also. They're now in
2 custody. They pled. But there are obvious problems
3 with potentially putting them on the stand.

4 So what I did was try to corroborate the
5 information that the other cooperator gave us as to who
6 Mr. Ocasio had either sold cocaine to, spoken to, who he
7 dealt with as part of a conspiracy for which we
8 charged. In doing that, I put in many hours trying to
9 track down two witnesses. One is in custody, is already
10 in Federal custody, however, not in Massachusetts, and
11 in May, myself, along with Agent O'Shaughnessy and a
12 Spanish-speaking agent, when interviewing this
13 individual -- a very lengthy interview, a 2 1/2 hour
14 interview, much longer than I anticipated it to be,
15 because I had a very specific event I wanted to speak
16 about, that individual was not able to identify
17 Mr. Ocasio and, in fact, gave me, and the Office more
18 information about Mr. Farias. He was able to identify
19 Mr. Farias and confirm that he was dealing large
20 quantities of cocaine, but was not able to identify
21 Mr. Ocasio. So I realized that to be a major problem.
22 But I knew that, going to that interview, I was going to
23 either learn that Mr. Ocasio was very heavily involved
24 or this person wasn't able to identify him and I learned
25 the latter.

1 Realizing that, it became imperative for me to
2 track down another person whose name was provided during
3 the proffers with the co-defendants. That person was
4 very difficult to track down. I was able to track him
5 down and interview him within the past two weeks. That
6 was someone who, if we were able to get a statement from
7 him, they would be able to corroborate what Mr. Ocasio's
8 role was in this conspiracy in terms of one very
9 specific event. I interviewed that person with Special
10 Agent O'Shaughnessy within, I believe, the past two
11 weeks and that person did give information which
12 corroborated Mr. Ocasio's involvement in the conspiracy,
13 however, in a different role than what Farias had
14 informed us of. I realized that was another issue with
15 Farias's potential testimony.

16 My focus then turned on, well, that last person I
17 spoke to -- I won't call them a "cooperator" at this
18 stage, but someone -- a source of information.

19 THE COURT: And is that the person you were
20 referring to on -- last week?

21 MR. FISHER: Well, the first one -- correct.
22 There were two sources of information, one was in
23 Federal custody out of state, who spoke to them. They
24 seemed to -- they were not able to corroborate the
25 information that the cooperator had given. Then the

1 second source of information was the one I most recently
2 spoke to. They were able to corroborate it, but in a
3 different set-up than what the cooperator told us. So
4 this led me to believe that he wasn't being entirely
5 truthful.

6 THE COURT: On Page 24 of the transcript,
7 you've told me that you and Agent O'Shaughnessy, last
8 Thursday, interviewed somebody who was a percipient
9 witness to information you got through another
10 cooperator and you interviewed that person and tried to
11 corroborate a version of the offense.

12 MR. FISHER: Correct.

13 THE COURT: And that report has not yet been
14 finalized. "So something like that I still need to turn
15 over to my brother. It just happened last week."

16 Is this the source of information that you're
17 referring to?

18 MR. FISHER: That's the source of the
19 information.

20 THE COURT: All right.

21 MR. FISHER: Who -- um, I determined it was
22 most likely reliable because the information was so
23 specific and we were able then to corroborate some of
24 that, but this road was never ending and it wasn't
25 necessarily making my case any stronger. And, of

1 course, that sort of information had issues of its own,
2 which we learned of after that interview.

3 So to say the wheels were sort of coming off the
4 case in terms of what I was going to prove against
5 Mr. Ocasio as charged, whether or not I could prove that
6 he was active in the conspiracy to traffic cocaine and
7 not necessarily just somebody who happened to be
8 present, or knew what was going on, and maybe had been
9 giving bribes. So that's -- my facts were changing and
10 it was a very fluid situation up until the scheduling
11 conference. So -- and that's what I'm referring to in
12 the motion to dismiss.

13 I'm setting aside the issue with the arrays
14 because by that point I had essentially moved -- I had
15 moved on. The co-defendant had become my main witness
16 in the case, someone who could help me satisfy all the
17 elements.

18 THE COURT: Well, that's a little different
19 than what you told me last week. Last week you told me
20 that you didn't oppose the motion to suppress because
21 you interpreted -- Mr. Fick and I felt misinterpreted it
22 as being directed only on the pretrial identification
23 and you were still hoping to use the Santoses to make an
24 in-court identification.

25 MR. FISHER: Correct, and this is what I may

1 have lost -- I may have been on thin ice here and I'll
2 explain why.

3 When the motion was first filed, I understood
4 there was an issue with the array. I had written a
5 letter, so there was no way I could oppose it, then turn
6 around and say, "Okay, even though the array was
7 botched, I'm then going to try and use it." And my
8 brother and I, we were clear on that issue. What arose
9 after the motions were filed was the issue of the report
10 that was drafted in October. I realized that was a
11 second issue which put me on much thinner ice in terms
12 of trying to salvage an in-court ID.

13 However, before I -- what I hadn't -- I thought I
14 would maybe salvage an in-court identification from the
15 Santoses at trial if I did intend to rely on it at
16 trial. The only reason I would intend to rely on it is
17 if Mr. Farias was not going to be used at all, which as
18 the days progressed in May, was looking more and more
19 like a possibility. So therefore I'm thinking, "Well,
20 maybe one of the Santoses would have to get on the
21 stand."

22 I anticipated that if there was a hearing,
23 evidence would be presented which would corroborate that
24 idea and get it further -- build a foundation to that
25 Santos ID because they were able to identify

1 Mr. Ocasio's home, in Lawrence, well before there was a
2 lockup ID or a tainted photo spread ID. In addition,
3 this defendant himself gave statements to investigators
4 before the lockup ID and the photo array ID that there
5 was a very strong possibility that he gave our two
6 cooperators a ride to the motel.

7 So I understood that I was probably on thin ice
8 anyway, but I wasn't just, in bad faith, running it out
9 there that I was going to try to put them on the stand
10 without any independent basis for that ID. I still felt
11 there was some potential independent basis for that ID,
12 which, of course, would have to be waived by the Court,
13 to salvage an ID by either Lorez or Jorge Santos, and
14 that was based upon the defendant's own statement and
15 the fact that these two folks from California, who had
16 been to Massachusetts one time in their life, in January
17 of '07, were able to show agents exactly where they
18 dropped off a load of cocaine and it was a house that
19 belonged to Mr. Ocasio. That's what I was resting that
20 argument on.

21 Granted was the fact that there was a report that
22 had been written 6 months later and that I didn't know
23 that it had not been turned over, because I was aware of
24 the situation, I thought it had been disclosed in
25 discovery prior to when I got the case. But right when

1 I realized it, I turned it over. That put me on a
2 weaker footing obviously.

3 That was -- that those were the reasons I'm
4 relying on here for the dismissal. It's the evidence I
5 gathered in May from two sources of information.

6 THE COURT: Well, I've got a series of
7 questions. Mr. Fick -- well, actually, let me ask
8 Mr. Fisher first.

9 The government is dismissing with prejudice,
10 correct?

11 MR. FISHER: Correct, your Honor.

12 THE COURT: Seeking dismissal with prejudice.
13 That means that there will be no Federal prosecution
14 relating to the events at issue in this case, right?

15 MR. FISHER: Correct.

16 THE COURT: What about potential state
17 prosecutions? Because this was an investigation --
18 well, have you determined what other law enforcement
19 agencies were involved in the investigation?

20 MR. FISHER: Your Honor, I have.

21 THE COURT: What were they?

22 MR. FISHER: Just to clarify, your Honor.

23 Everybody knows that -- the task force agents that were
24 there were all part of a cross-border initiative. As
25 the Court knows, local officers from local police

1 departments work to help gather evidence.

2 THE COURT: But last week you weren't able to
3 --

4 MR. FISHER: It was Salem --

5 THE COURT: What's that?

6 MR. FISHER: It was Salem, New Hampshire where
7 Mr. Fay -- I believe I was right, that he works for
8 Lowell. So they do work for other agencies. However --
9 and just to clarify for the record, I did, when I
10 inherited this case, speak to Agent O'Shaughnessy, first
11 thing, and try to determine that those agents had not
12 written reports. That we had all the reports. That he
13 had all the notes, if they had any written notes. I --

14 THE COURT: Well, two things.

15 MR. FISHER: The Court's position is that I
16 should have contacted each task force agent.

17 THE COURT: Well, first of all, it's not my
18 position, it's the Supreme Court's position. We went
19 over this last week and you understood it last week.
20 Maybe you forgot it. If something's not -- if it is
21 exculpatory in material, even if it's not written down,
22 the government has an obligation to disclose it. An
23 obvious question is whether the information about what
24 occurred in the lockup downstairs here wasn't included
25 in the original report, you know, or whether it was left

1 out?

2 The transcript which I've reread -- and I keep
3 having to put other things down to deal with these
4 recurring issues, reminds me what you told me last week,
5 that you didn't know all the agencies involved in the
6 investigation. And if you don't know all the agencies
7 involved in the investigation, then you can't make the
8 inquiry required under **Kyles**, a Supreme Court case, or
9 under our local rule, which was intended to keep well-
10 meaning prosecutors like you out of trouble and promote
11 fair trials.

12 And have you had any -- when did you come to the
13 U.S. Attorney's Office?

14 MR. FISHER: Your Honor, I started in June of
15 2007.

16 THE COURT: All right. And did you have
17 instruction on **Brady** responsibilities?

18 MR. FISHER: I did, your Honor. Correct.

19 THE COURT: And where were you instructed?

20 MR. FISHER: I had training here.

21 THE COURT: Did you go to the Department of
22 Justice training at the National Institute or whatever
23 they call it?

24 MR. FISHER: Your Honor, I have the -- it's
25 the National Advocacy Center. I've been there, correct.

1 THE COURT: All right. And have you read the
2 --
3

4 MR. FISHER: I was a state prosecutor and a
Federal prosecutor.

5 THE COURT: Yeah. Have you read the pertinent
6 provision of the U.S. Attorney's manual?

7 MR. FISHER: I have, your Honor. When I
8 started with the Office, I read the entire manual.

9 THE COURT: Because it says: "It is the
10 obligation of Federal prosecutors, in preparing for
11 trial, to seek all exculpatory and impeachment
12 information from all members of the prosecution team.
13 Members of the prosecution team include Federal, state
14 and local law enforcement officers and other government
15 officials participating in the investigation and
16 prosecution of the criminal case against the
17 defendant." **Kyles**, 514 U.S. at 4347.

18 So it's not my idiosyncratic position that you're
19 supposed to do it, but that you have a constitutional
20 duty to do it, you have a duty to do it under the local
21 rules, and the Attorney General of the United States is
22 telling you to do it.

23 MR. FISHER: Correct, your Honor, and this is
24 what I did, to clarify the record.

25 The very first time I ever stood up in this case

1 in court was in this building for the scheduling
2 conference on May 27th. At that time I was still
3 working on -- the evidence in this case was extremely
4 fluid at that time. I was still trying to report to my
5 brother, which he will attest to. I was still tracking
6 down witnesses out of state. I had to come back from
7 Las Vegas. I had been still investigating the case.

8 My understanding, and I believe I'm correct, was
9 that because all the agents that worked on this case
10 weren't Federal marshals, they were task force agents,
11 they were not submitting reports to their local PDs,
12 whether in Salem, New Hampshire, or the Lowell Police
13 Department, they were working under the case agent's
14 authority, Agent O'Shaughnessy, due to their cross-
15 border initiative, that -- I had this conversation with
16 Special Agent O'Shaughnessy.

17 Of course, if I'd -- my understanding is that I
18 would come to the scheduling conference, we would get a
19 motion to suppress date, any witnesses that I would be
20 calling or relying on in court, of course, I'm going to
21 sit down with every single one of them in detail and
22 then, well before trial, I'm going to do the same exact
23 thing. That is my practice. My understanding was that
24 when I inherited -- in this period between discovery
25 being complete and preparing for a motion, I was focused

1 on the potential that I would need Special Agent
2 O'Shaughnessy on the stand for a consent search and
3 maybe another witness. We were still actively speaking
4 about resolving the case. I was turning over volumes of
5 information to my brother about what other cooperators
6 were saying. So that's where my focus was.

7 THE COURT: Well, if that's your focus -- your
8 focus should have been -- well, a couple of things.
9 First of all, this isn't Mr. Fisher versus Mr. Ocasio,
10 this is the United States of America versus Mr. Ocasio,
11 and some of the defects here occurred before you were
12 even employed by the United States Attorney's Office.
13 Essentially, under the local rules -- were you
14 instructed on the local rules?

15 MR. FISHER: I was, your Honor, and I
16 frequently refer to them.

17 THE COURT: Yeah, under the local rules,
18 within 42 days of arraignment, in effect, all material
19 exculpatory evidence has to be disclosed that relates to
20 the admissibility of evidence that's pertinent to a
21 motion to suppress. And material exculpatory evidence
22 doesn't mean material exculpatory information provided
23 by somebody the government intends to call, that's
24 **Jencks**, but if there's somebody you don't intend to call
25 who has material exculpatory information, you have a

1 duty to turn that over.

2 MR. FISHER: Your Honor -- again, let me
3 clarify that. During the pendency of those 42 days, I
4 was with the Attorney General's Office and --

5 THE COURT: When I say "you" -- and that's a
6 good point. When I say "you," I don't mean you,
7 Mr. Fisher, I mean the United States of America, the
8 human beings who work in the Department of Justice who
9 represent the Attorney General of the United States
10 Attorney in court. The government has that obligation.
11 And, as I said, if your predecessor, in performing the
12 duties you're now performing, had performed them
13 correctly, you wouldn't be in this predicament. But --
14 and, you know, I want to repeat. I mean, I can see
15 you've been trying to do this right. But as you said
16 last week and I think you said again today, there are
17 errors and imperfections that the motion -- the request
18 to dismiss, you know, recognize are very important.
19 This might have gone to an unfair conclusion, which is
20 not what any prosecutor should wish for -- and I don't
21 get the sense it's what you wish for, and it's certainly
22 not what any judge who's trying to assure trials that
23 are fair to the government and to the defense wishes for
24 or can tolerate.

25 MR. FISHER: Your Honor, and that was one of

1 the reasons, your Honor, I was working -- putting in a
2 lot of hours trying to corroborate everything they could
3 give me towards getting to the bottom of what
4 Mr. Ocasio's role really was in this case.

5 THE COURT: All right. But what about the
6 question I asked you, is Mr. Ocasio at risk for being
7 prosecuted by some authority other than the Federal
8 government for the events relating to this case?

9 MR. FISHER: I approach that two ways. One,
10 because the state is a separate sovereign, could they
11 potentially charge here for his role in this
12 conspiracy? Um, I guess they could. I've never spoken
13 to a state official to get a determination of whether or
14 not they have any interest in the case.

15 Now, I can speak on my experience as a state
16 prosecutor, as I was one before I came here, that
17 Mr. Ocasio, even if he was charged by the state, if I
18 was still with the AG's office and somebody sent this
19 case over and said, "Would you charge him?" I would
20 have to say "No." Under the state law, it's a dry
21 conspiracy. The 15 kilograms were taken off in Kansas.
22 Therefore he never possessed cocaine in this state.
23 Therefore it's a straight conspiracy. It carries a
24 maximum of 20 years, but no minimum mandatory. I would
25 be -- if he was ever charged, which is highly unlikely,

1 and convicted, I'd be surprised if he got 90 days on
2 that type of conspiracy and with that type of evidence
3 in the state court. No. But, no, I have not confirmed
4 it.

5 THE COURT: All right. In some cases there
6 are agreements from prosecutors. But my interest here
7 is assuring that before I turn to Mr. Fick and
8 Mr. Ocasio, um, that they know what risk, if any, there
9 is.

10 Mr. Fick, does Mr. Ocasio want the charges
11 dismissed with prejudice?

12 MR. FICK: Yes, your Honor.

13 THE COURT: And have you discussed that with
14 him?

15 MR. FICK: Yes, your Honor.

16 THE COURT: And, Mr. Ocasio, please stand.

17 (Defendant stands.)

18 THE COURT: Do you understand that the
19 government now wants to -- the Federal government, the
20 United States government now wants to dismiss the
21 charges against you and says that the United States
22 government will not try to prosecute you again for
23 events relating to the charges in this case?

24 THE DEFENDANT: Yes.

25 THE COURT: And have you talked with Mr. Fick

1 about whether you want the charges against you, in this
2 case, dismissed?

3 THE DEFENDANT: Yes.

4 THE COURT: Are you fully satisfied with his
5 work as your lawyer?

6 THE DEFENDANT: Yes.

7 THE COURT: And do you want the charges
8 dismissed?

9 THE DEFENDANT: Yes.

10 THE COURT: Do you understand there's a
11 possibility that some state, Massachusetts or New
12 Hampshire, perhaps might conceivably prosecute you?

13 THE DEFENDANT: Yes.

14 THE COURT: And do you still want these
15 Federal, United States charges dismissed?

16 THE DEFENDANT: Yes.

17 THE COURT: Thank you. You may be seated.

18 (Defendant seated.)

19 THE COURT: I have some more questions.

20 Mr. Fick -- not Mr. Fick, excuse me, Mr. Fisher.

21 Mr. Fisher, in my May 27th order, I directed you
22 to, in effect -- well, on May 27th, I essentially
23 directed you to get and review all the notes from all
24 the participating agencies and disclose all exculpatory
25 information by June 1. Did you do both of those

1 things?

2 MR. FISHER: I did that, your Honor.

3 THE COURT: And is there any investigation
4 being conducted to determine whether Mr. O'Shaughnessy
5 should be disciplined or possibly prosecuted under 18
6 United States Code, Section 1001, for the filing of the
7 -- the preparation, presentation to the U.S. Attorney of
8 the DEA 6 that stated that two cooperating witnesses had
9 conducted the investigation -- had conducted the
10 identification separately?

11 MR. FISHER: Your Honor, my understanding, and
12 I can confirm that his supervisor is well aware of the
13 situation.

14 THE COURT: That doesn't -- they're well aware
15 of it. So what are they doing about it?

16 MR. FISHER: I'm not privy to the internal
17 dialogue of the supervisor of the DEA. All I can
18 represent to the Court is that that's my personal
19 understanding, that they do know of the situation.

20 THE COURT: Well, this goes right to the point
21 in **Rinali**. I fully understand that it's 100 percent up
22 to the government whether to bring charges and it's
23 substantially, but not exclusively, up to the government
24 whether to dismiss charges, but there are only limited
25 circumstances on which I properly could or would decline

1 to dismiss, but one of them is if "the motion is
2 prompted by considerations clearly contrary to the
3 public interest," the Supreme Court says. And I am
4 concerned that if I dismiss this case, nothing will
5 occur in court that creates a record of the
6 circumstances under which that DEA 6 was prepared and
7 with regard to what might be -- and I'm not saying it
8 is. I'm very cautious about coming to conclusions that
9 law enforcement agents or prosecutors have engaged in
10 misconduct, but it's happened and I found that it's
11 happened.

12 As I told you last week, as far as I'm concerned,
13 this isn't the National Basketball Association where
14 it's sometimes said "no harm, no foul." You know, the
15 fact that an inaccurate, and possibly deliberately
16 inaccurate DEA 6 report was prepared here, raises a
17 question of whether it was intentional, and if it's
18 intentional, whether it's part of a practice? And I
19 don't know how you or Mr. Loucks propose to address that
20 concern.

21 MR. FISHER: Your Honor, with all due respect
22 to the Court, Mr. Loucks, as I said before, couldn't be
23 here today.

24 THE COURT: And, in fact, it may not get
25 resolved today. If I had been told that he would have

1 liked to be here, but he had a graduation, I would have
2 rescheduled this for some other time. This just may not
3 get resolved today because I have the concern that I
4 just expressed.

5 MR. FISHER: And I believe that the Acting
6 United States Attorney does want to address any good
7 faith considerations to the underlying motion to
8 suppress. However --

9 THE COURT: I'm sorry. I don't understand
10 what that means?

11 MR. FISHER: Well, if the Court has any
12 questions as to the deliberation -- well, Mr. Loucks, he
13 has the authority to -- he signed the dismissal and
14 therefore he has the power of his office that goes
15 behind me being an assistant, although the information
16 contained therein about the weaknesses in the case, that
17 came from me and the investigation I did.

18 But because there is -- under **Rinali**, in the
19 Footnote 15, which you refer to, they also -- they cite
20 **United States vs. Cowan** in that decision, and albeit
21 it's a Fifth Circuit decision, but the Supreme Court
22 does cite it in that very important footnote, that there
23 is a presumption that the government did act in good
24 faith to establish that there was no betrayal of the
25 public interest or the public trust. And I would

1 represent to the Court that the investigation I did is
2 what made this case essentially unprovable, even though
3 at one point I feel as though I could have proven it
4 without the Santoses, necessarily. So that there would
5 have been -- there was no taint that would have reached
6 the trial. However, I continued to investigate that
7 cooperator. I was going to be relying on so much at
8 trial. That was going to be a very fruitful witness.
9 So that's what I'm --

10 THE COURT: I read both **Cowan** and **Amadine**
11 quickly this morning, the two cases cited by the Supreme
12 Court in that footnote. It's possible that the evidence
13 has eroded, but that dismissal of this case now, without
14 any further proceedings, will be contrary to the public
15 interest because it will abort the process which would
16 permit me to make a factual finding on whether a
17 misstatement in the DEA 6 about whether cooperating
18 witnesses were interviewed separately was deliberate or
19 not.

20 MR. FISHER: Your Honor, and I can say that I
21 respect that -- well, I respect that, but I also
22 understand it because I myself had problems with that
23 report and that's why I drafted my letter. However, one
24 can see as I've -- it's very easy to get sucked into the
25 quicksand of using the inappropriate word. I'm not

1 trying to justify what the agent used because I, myself,
2 had a problem with that and that's why I wrote the
3 letter. But referring to myself, I used the word
4 "clarify" when the Court believed I should have used the
5 word "correct." So there isn't a trap that -- you know,
6 I write basically for a living and it seems that I fell
7 into the trap.

8 THE COURT: Well, maybe we ought to have
9 Mr. O'Shaughnessy in and I ought to hear his explanation
10 and then I'll be in a position to see whether I -- you
11 know, how concerned I am.

12 In my **Jones** decision from May 18th, which you told
13 me last week that you read, I explained why I don't
14 regard it as sufficient to rely, say, on the Department
15 of Justice's Office of Professional Responsibility for
16 the DEA, who I believe has an Inspector General or
17 something, comparable, but my unfortunate experience,
18 since I helped establish that process in 1975, too, is
19 that it's just not right -- and I helped establish it
20 because I was the Assistant to the Attorney General of
21 the United States and the Drug Enforcement
22 Administration was my client and it was -- there were
23 allegations of misconduct at high levels of the Drug
24 Enforcement Administration, so the First Attorney
25 General Levi put in the former Watergate Special

1 Prosecutor, Chuck Roff, to deal with matters on an ad
2 hoc basis and then I think after that it became more
3 institutionalized. But I'm reluctant to just say that
4 my referring this matter to the DEA's Inspector General
5 would be sufficient if there's reason to be concerned
6 about a deliberate misstatement. So maybe I ought to
7 hear from Mr. O'Shaughnessy.

8 MR. FISHER: I would suggest that may be
9 premature at this stage until you have the opportunity
10 to hear from Acting United States Attorney Loucks
11 because my understanding is that if we do -- the
12 assumption is that we had a good faith basis and I
13 represent to the Court that this is the basis for which
14 we have moved and at that point there would be no case
15 and controversy at least under this jurisdiction to --

16 THE COURT: It would be complicated if you
17 don't want to prosecute it, but I still have to decide
18 whether it's in the public interest to -- when it's
19 clearly contrary to public interest, to dismiss the
20 case. You know, it may be that 20 minutes of testimony
21 will take care of it and the matter can be resolved this
22 morning.

23 MR. FISHER: That's a possibility, your Honor,
24 however, I feel uncomfortable speaking for the United
25 States Attorney and --

1 THE COURT: He doesn't have any personal
2 knowledge of the circumstances concerning the
3 preparation of the DEA 6.

4 MR. FISHER: I'm not sure he does. However, I
5 think because he signed the motion to dismiss and the
6 Court would be weighing his representations as to why
7 the case needs to be dismissed, and based upon the
8 presumption that there was good faith in the fact that I
9 came here and did my best to explain what led me to
10 believe there was nonsufficient evidence, and therefore
11 to communicate that back to Acting United States
12 Attorney Loucks, that based upon that, the case, if it
13 stands, that now there's no more a case and controversy
14 for Agent O'Shaughnessy to testify about.

15 THE COURT: No, the controversy arises under
16 the Footnote 15. I don't feel I yet have all the
17 information necessary to decide whether dismissal of the
18 case this morning would be contrary to the public
19 interest.

20 MR. FISHER: And that's why I keep coming back
21 to Acting U.S. Attorney Loucks, because he was the one
22 that made that deliberate decision to, that this case
23 needs to be --

24 THE COURT: But he doesn't have the
25 information either. He has -- did he read the

1 transcript of the May 27th hearing?

2 (Pause.)

3 THE COURT: Look, put it this way. Did you
4 give him the transcript of the May 27th hearing?

5 MR. FISHER: I can tell the Court that once I
6 got that, I e-mailed it around to my supervisors. I
7 don't remember directly sending anything to him, but my
8 understanding is that he got it. I don't know. But if
9 I had to guess, I would say that, yes, he did read it.
10 Now -- but I would just try to reiterate to the Court
11 that the U.S. Attorney did expect that he would be heard
12 on the motion to dismiss. But if the Court is not so
13 inclined to --

14 THE COURT: No, and, in fact, I would give him
15 that chance. I don't -- if I hear from Agent
16 O'Shaughnessy, this morning, then the transcript can be
17 prepared, Mr. Loucks can read it, and he can tell me
18 what if anything he's going to do, you know, to further
19 investigate or suggest discipline concerning Agent
20 O'Shaughnessy, or I might hear the answer myself and
21 think there's nothing more that needs to be done. But
22 this is going to have to be done at any point, in my
23 present conception, and my time is very limited. Today
24 is the day I put aside for this case. I wouldn't have
25 ordered Mr. Loucks to come here if he had a high school

1 graduation, but I wasn't asked to postpone this, and at
2 this point, here we are, and I'm going to deal with
3 this.

4 MR. FISHER: Your Honor, just to -- but I am
5 not authorized to permit Special Agent O'Shaughnessy to
6 testify today, under the Tuey regulations. I'm not able
7 to authorize that.

8 THE COURT: That should have been raised in
9 advance. You knew I ordered him to come here to
10 testify. I told you that last week. I'm not bound by
11 the Tuey regulations.

12 MR. FISHER: However -- I'm sorry, your
13 Honor. However, that -- we did move to dismiss the case
14 yesterday. I realize that. It was at noon or maybe
15 thereafter that we did it, so. However, it was my
16 understanding that doing that, um, now there is no case
17 in controversy.

18 THE COURT: Well, your understanding is
19 incorrect and Mr. Loucks knows it's incorrect. He and I
20 -- the language I put in my order yesterday I took out
21 of the order I issued to him in December of 2006 in the
22 **Diaz** case, the last time he asked me to put two drug
23 dealers back on the street because the government didn't
24 turn over material exculpatory evidence after I declared
25 a mistrial and explained in detail where they needed to

1 look in the FBI files for it, because I felt I knew a
2 lot about the way the FBI kept its files.

3 MR. FISHER: Your Honor, just to
4 differentiate, as the prosecutor in this case, the
5 person who is handling it day to day, I don't view that
6 they're dismissing it because either myself or my
7 predecessor or an agent didn't reveal exculpatory
8 evidence, because at the end of the day -- at the end of
9 the day, my brother, Attorney Fick, he knew about that
10 lockup ID, that AUSA Connolly had told him about it.
11 What transpired during '07? I don't know. I wasn't
12 privy to it. But in trying to recreate the record to
13 find out how something like that fell through the
14 cracks, I've learned quite a bit about it. So my
15 understanding is that Attorney Fick, most likely did
16 know about it, however it was not memorialized until I
17 got the case.

18 Now, I don't view that being the reason to dismiss
19 the case. The case, literally over the course of May,
20 um, has changed and my ability to prove each and every
21 element has changed. Would I be able to convict him on
22 this particular felony? Possibly. But the way it's
23 charged now? No. So that's what -- that's why I --
24 that's why we presented this motion.

25 THE COURT: Well, I can assume that's true, I

1 may find that's true, but it's not the only part of the
2 public interest that's implicated here. I'd like to get
3 this resolved ideally today or at least end our in-court
4 involvement in it. Let me ask you one more question
5 before I perhaps call for Mr. O'Shaughnessy.

6 Do any of these issues that have prompted the
7 motion -- the request to dismiss under Rule 48(a) have
8 implications for Mr. Farias who pled guilty and is
9 scheduled to be sentenced on June 17th? I'll ask you
10 and then this morning I had Mr. O'Leary call Mr. Garrity
11 and tell him about this hearing because I thought he
12 should have a chance to respond to that question, too.

13 MR. FISHER: And thank you, your Honor, for
14 doing that. I agree that that was a good position to
15 take, that he be here and be privy to this.

16 In fact, the information I gathered throughout the
17 month of May does affect his client, however it makes
18 the case against his client that much -- it actually, in
19 all, it implicates his client in this conspiracy. So in
20 that matter it does affect him somewhat and he, of
21 course, would want to be aware of that prior to
22 sentencing.

23 The issues that the Court is concerned with with
24 the photo array and the lockup ID, that didn't involve
25 Mr. Farias at all. In fact, he had been arrested the

1 week prior and I believe he may not have already been
2 released by that point. So he shouldn't have even been
3 in the building that day. And, in fact, the Santoses
4 were not able to identify him in a photo array. So --
5 however, the two individuals I tracked down in May were
6 able to identify him in a photo array and have given us
7 quite a bit of information about his role.

8 THE COURT: Mr. Garrity, do you feel any of
9 this has implications for Mr. Farias?

10 MR. GARRITY: Judge, um --

11 THE COURT: Well, let me put it this way.
12 I'll be more precise. In certain limited circumstances
13 that I described in detail in **Ferrara**, 384 F. Supp. 2nd,
14 384, which was affirmed by the First Circuit in 456 F.
15 3rd 278, the failure to disclose material exculpatory
16 evidence, particularly negating guilt, could render a
17 plea not knowing, involuntary. So I didn't know what
18 Mr. Fisher was going to tell me this morning about the
19 unreliable information, the erosion of the government's
20 case concerning Mr. Ocasio, and so it could be that and
21 there's that open issue, from the First Circuit decision
22 in **Santana**, that if some pattern of government
23 misconduct that's outrageous occurs, that there's
24 supervisory powers that can be exercised -- can and
25 should be exercised -- can and should be exercised to

1 dismiss a case. But I haven't found any misconduct yet
2 at least beyond the delayed disclosure of some
3 exculpatory evidence that Mr. Ocasio is entitled to. So
4 that's the context of the question I'm asking you.

5 MR. GARRITY: Right. And, Judge, just so the
6 Court's aware of where my head has been at in the last
7 month, I just finished up a murder trial late yesterday
8 afternoon and I was in there for a month, and so I saw
9 the PACER notice yesterday and that raised concerns for
10 me. And when I tried to contact Mr. Fisher this morning
11 and wasn't able to reach him and then the Court called
12 me to come down, that was one of the questions I had,
13 that when I saw your reference to Agent O'Shaughnessy,
14 does that then raise an issue with respect to perhaps --
15 moving perhaps to vacate the prior guilty plea? But now
16 what I'm hearing also raises further concerns in my mind
17 with respect to Mr. Farias's position in terms of the
18 sentencing, if vacating the guilty plea doesn't take
19 place. It certainly does raise a concern.

20 THE COURT: I think I'm going to have to give
21 you some time to absorb this and consider it with your
22 client.

23 (Pause.)

24 THE COURT: Well, let me ask you this. I just
25 heard, for the first time, that the Santoses identified

1 your client or am I mistaken about that?

2 MR. FISHER: The Santoses were never able to
3 identify Mr. Farias.

4 THE COURT: Oh, they didn't. Okay. Somebody
5 else did. Okay.

6 MR. FISHER: That's the information we learned
7 in May. That -- I can turn the reports over, the notes
8 over to Mr. Garrity, but there have not been any DEA 6s
9 finalized for those interviews. But I was present for
10 both of them and that's why I communicated to the Court
11 that information I had gathered.

12 THE COURT: Well, I guess I would say the --
13 well, I'll give you time.

14 MR. GARRITY: That's fine, Judge. And some of
15 what was turned over to Mr. Ocasio, I'm not sure whether
16 I got it. I can't tell you because I haven't looked at
17 the file, I haven't looked at it since my other
18 proceeding was pretty lengthy, but some of the stuff may
19 not have gotten to me. And Agent O'Shaughnessy was a
20 key witness and Mr. Farias was arrested and Agent
21 O'Shaughnessy interrogated or questioned Mr. Farias.
22 And it certainly does raise a concern with respect to
23 credibility, what I'm hearing. So I would ask to be
24 given everything that was given to Mr. Ocasio.

25 THE COURT: Is there any objection to that?

1 MR. FISHER: Oh, Judge, there's no objection
2 to that.

3 THE COURT: All right. How long will it take
4 you to put that together and give it to Mr. Garrity?

5 MR. FISHER: I can't imagine it taking more
6 than a couple of weeks. Some of the -- he may not have
7 some of the DEA 6s, that is, of statements his own
8 client gave or that had been proffered, but I'll make
9 sure that he does.

10 THE COURT: Well, that's going to necessitate
11 my postponing Mr. Farias's sentencing. But is that
12 something you request?

13 MR. GARRITY: Yes, your Honor.

14 THE COURT: Well, I think, in the
15 circumstances, the oral motion for the exculpatory
16 information or all the information that's been turned
17 over to Mr. Ocasio is meritorious.

18 When you say a couple of weeks, do you think two
19 weeks?

20 MR. FISHER: That should be fine, your Honor.

21 THE COURT: All right. Well, the government
22 shall provide counsel for Mr. Farias all of the
23 information it provided Mr. Ocasio and any other
24 material exculpatory information and do that by June
25 19th.

1 And then what would you like, Mr. Garrity, a
2 couple of weeks to absorb that and discuss it with your
3 client?

4 MR. GARRITY: If I could, your Honor.

5 THE COURT: All right. Then Mr. Farias shall
6 by, let's say, July 17 either file a statement that you
7 want to proceed with the sentencing or file any motion
8 you wish to file. Okay?

9 MR. GARRITY: That's fine, Judge. Thank you.

10 THE COURT: Okay. And the government will
11 have two weeks to respond, to July 31st.

12 But you should tell me, Mr. Fisher, and all of you
13 should tell me if the schedule is going to interfere
14 with anybody's planned vacation, because I'll get a
15 response by July 31, if there's a motion, and we'll say
16 on -- if there's a motion filed and there's a response,
17 any reply will be due August 7th. I will conduct either
18 a hearing on the motion or the sentencing on August 13th
19 at 3:00.

20 MR. GARRITY: Judge, I'm scheduled to be on
21 vacation from August 3rd to August 17th, I believe.

22 THE COURT: Well, then you're not going to be
23 able to reply to something. Why don't I try to get all
24 this briefing done, if there's going to be briefing,
25 before you go.

1 Can you file your statement that you want to go
2 ahead with the sentencing or your motion by July 10th,
3 I'll give the government until July 24th to respond, and
4 the reply, if there's going to be a reply, shall be
5 filed by July 31.

6 MR. GARRITY: That's fine, your Honor. Thank
7 you.

8 THE COURT: And then we'll have the sentencing
9 or hearing on any motion when you return, August 19th.
10 Okay?

11 MR. GARRITY: That's fine, your Honor.

12 THE COURT: All right.

13 Now, here's the one open point. In connection
14 with the request to dismiss under Rule 48(a), I think
15 that to make a properly informed decision, I should hear
16 some testimony, which I think could be rather brief,
17 from Mr. O'Shaughnessy, unless he feels he has or wants
18 to assert some Fifth Amendment right not to testify.
19 And it's possible, when I hear the explanations, I'll be
20 satisfied and I can dismiss the case today. And if
21 there's some open issue, the transcript will be prepared
22 and I'll have to find some time to -- probably shortly
23 after the transcript is prepared, to have further
24 discussion about it.

25 So do you want an opportunity to talk to

1 Mr. O'Shaughnessy?

2 MR. FISHER: A recess may be fruitful, but as
3 I said before, I'm not authorized today to permit his
4 testimony under the Tuey regulation.

5 THE COURT: Well, maybe I'll go get the file.
6 I might order him to testify. I can go into contempt.
7 And we can go from there.

8 MR. FISHER: Again, a recess may be fruitful
9 at this point.

10 THE COURT: All right. Because -- and you
11 don't have to give me the substance of it, but have you
12 talked to him about what caused him to write the DEA 6
13 the way he wrote it on the identification, "separate" as
14 opposed to "together"?

15 MR. FISHER: Well, I spoke to him when I,
16 obviously, to draft my letter, I didn't want to draft it
17 uninformed, and he was the best witness to what actually
18 happened, um, and I can tell the Court that he used the
19 word "separately" because he used two separate photo
20 arrays.

21 THE COURT: So if he tells me that, I might be
22 persuaded -- and I'm totally open minded, but I'm not
23 inclined to just ignore it. You know, I may dismiss the
24 case and issue an order that suggests that DEA agents or
25 at least this one get further instruction on the form.

1 And we might be finished with this in the not so -- in a
2 short period of time. But I'll -- it's 10 minutes of
3 11:00 and we'll resume at 5 minutes after 11:00.

4 MR. FISHER: Thank you, your Honor.

5 THE COURT: The Court is in recess.

6 (Short recess, 10:50 a.m.)

7 (Resumed, 11:20 a.m.)

8 THE COURT: I see we have a new interpreter.
9 We'll have the oath administered to him.

10 (INTERPRETER, RAFAEL RODRIGUEZ, sworn.)

11 THE COURT: Okay. Mr. Fisher, I've looked at
12 the regulations and my discussion of them in ***United***
13 ***States vs. Salemme***, 978 F. Supp. 364 at 365.

14 Is the government prepared to call
15 Mr. O'Shaughnessy?

16 MR. FISHER: Your Honor, as I said before, I
17 suggested the recess may be fruitful and it was. We're
18 prepared to have Mr. O'Shaughnessy answer questions.

19 THE COURT: Okay. Excellent. And I don't
20 want to impede this or delay it, but my reading of the
21 regulations, particularly 28 United States Code, Section
22 16.23, tells me that you're fully authorized to, on
23 behalf of the Department, in this case with the United
24 States as a party, to put him on the stand. This
25 doesn't appear to me to be any violation of the

1 regulations or to implicate them.

2 So here's -- Mr. Fick, would you like to -- the
3 government could question first, but if you'd like, you
4 could cross-examine. You know what I'm interested in.
5 If you don't want to examine the witness for some reason
6 because you think it might be adverse to your client's
7 interest, then I'll ask him some questions, which I may
8 probably do anyway.

9 MR. FICK: Your Honor, I do not plan to ask
10 the witness questions. The other thing that I would say
11 briefly is that while I certainly appreciate the Court's
12 concern with systemic issues of exculpatory evidence, my
13 duty begins and ends with Mr. Ocasio and from my point
14 of view the whole case or controversy here is about the
15 charges against Mr. Ocasio, and I do not believe it
16 could possibly be in the public interest, under the
17 circumstances, to leave him in the case.

18 THE COURT: There's no need to argue this.
19 But have you read Note 15 of **Rinaldi**?

20 MR. FICK: I have, your Honor.

21 THE COURT: So -- it points out there may be
22 circumstances where even when the defendant and the
23 government agree, it's clearly contrary to public
24 interest to allow it. This is going to give me some
25 information that will help me determine whether this is

1 that rare instance. But I understand why you prefer not
2 to develop this. Your duty is to Mr. Ocasio. My duties
3 are broader. So I'll let the government question
4 first.

5 Mr. Garrity, I assume you're not going to want to
6 question him either. Or maybe you are. I don't know.

7 MR. GARRITY: Judge, I haven't seen the
8 reports, I don't believe that they've been discussed, so
9 I guess I'm not in a position to question at this time.

10 THE COURT: All right. And, in fact, I need
11 the second DEA 6. I have the first one.

12 MR. FISHER: Your Honor, I have copies of
13 both. If the Clerk would like to just mark both of them
14 now?

15 THE COURT: Sure.

16 (Hands up.)

17 MR. FISHER: I believe I have them in the
18 correct order. The draft is on the top.

19 THE COURT: The DEA Report of Investigation
20 prepared by March 2, 2007 will be Exhibit 1 of today's
21 date. The Report of Investigation prepared October 29,
22 2007 will be Exhibit 2.

23 (Exhibits 1 and 2, marked.)

24 THE COURT: Do you have any extra copies of at
25 least the second one?

1 MR. FISHER: I have an extra copy of the
2 first. My brother, Attorney Fick, may have an extra
3 copy of the second.

4 MR. FICK: I actually only have one copy of
5 the second, your Honor. I can hand it up.

6 THE COURT: Well, okay. Thank you. We'll get
7 you a copy afterwards.

8 MR. FICK: I have more in my office, your
9 Honor.

10 (Hands up.)

11 MR. FISHER: Your Honor, the second copies are
12 redacted. The first copies I provided you are not.

13 THE COURT: And do you have the -- the motion
14 to suppress has attached to it what Mr. Fick said, I
15 think -- well, let me ask you this. Attached to the
16 motion to suppress is something that says "Photo
17 Identification Procedure." Is that part of a form as
18 you understand it?

19 MR. FICK: My understanding is yes, but that
20 understanding could be out of date and that's an issue
21 that we've never gotten completely to the bottom of. I
22 obtained this form from counsel in another district
23 where there was a similar DEA array was the subject of a
24 motion to suppress, an order was issued, I think, in '07
25 or '08, I called the lawyer, I was provided with this

1 form, and it was represented to me that that form was
2 the subject of that motion. That's where I got it and
3 that's all I know about it.

4 THE COURT: Okay. Thank you. Why don't we
5 call Mr. O'Shaughnessy.

6 MR. FISHER: Thank you, your Honor. The
7 government calls Special Agent Michael O'Shaughnessy.

8 (SPECIAL AGENT MICHAEL O'SHAUGHNESSY, sworn.)

9 MR. FISHER: May I proceed, your Honor?

10 THE COURT: Yes.

11

12 *****

13 SPECIAL AGENT MICHAEL O'SHAUGHNESSY

14 *****

15

16 DIRECT EXAMINATION BY MR. FISHER:

17 Q. Good morning, Special Agent O'Shaughnessy.

18 A. Good morning, sir.

19 Q. Would you please state your name for the record,
20 spelling your last name.

21 A. Michael O'Shaughnessy, O, apostrophe,
22 S-H-A-U-G-H-N-E-S-S-Y.

23 Q. And how are you currently employed?

24 A. I'm a Special Agent with the Drug Enforcement
25 Administration.

1 Q. And can you please inform the Court of the training
2 and experience you received to become a Special Agent
3 with the DEA and where you're currently assigned?

4 A. Um, it's four months of training in Quantico
5 Virginia and extensive training in surveillance, arrest
6 techniques, cultivating witnesses, interviews, and I'm
7 currently assigned to the Boston Field Division
8 specifically in Lowell, Task Force 4, the Cross --
9 excuse me, the Cross-Borders Initiative in Lowell.

10 Q. And how long have you been a Special Agent with the
11 Drug Enforcement Administration?

12 A. Just over 11 years.

13 Q. And over that 11 year career, what if any other
14 locations have you been assigned?

15 A. Well, prior to that I was a Special Agent with the
16 U.S. Customs Service. I was assigned in Los Angeles. I
17 was there for approximately 7 years. And my --

18 Q. That was with Customs?

19 A. That was as a Customs Agent, yes.

20 Q. And you received training to become a Customs Agent,
21 correct?

22 A. That's correct.

23 Q. And what was that training?

24 A. 4 months in Glen Cove, Georgia. Much of the same
25 training, except not with a specific focus on drugs, a

1 more broader focus on anything that can get smuggled
2 into the United States, drugs, any contraband, money,
3 munitions, child pornography, things of that nature.

4 Q. So it's safe to say, for the past 11 years, you've
5 been working primarily on drug cases, is that correct?

6 A. That's correct.

7 Q. And please describe for the Court some of the cases
8 you've been working on, not specific, but the overall
9 subject matter?

10 A. Um, the lion share of our investigations involve
11 trafficking of cocaine, heroin, um, occasionally other
12 drugs. Sometimes marijuana. We target drug traffickers
13 specifically that have a relationship to customers
14 coming down from Southern New Hampshire,
15 Maine and Vermont and entering Massachusetts to obtain
16 drugs in the Merrimac Valley Area, Lowell and Lawrence
17 specifically.

18 Q. And please describe for the Court what if any
19 investigation you were working on in February of 2007
20 which involved the arrest of Juan Ocasio?

21 A. I was the lead case agent in an investigation that
22 involved Mr. Ocasio, Mr. Farias, um, we had two other
23 um, defendants in that case as well, Jorge and Maria
24 Lopez Santos. We received information specifically on
25 February 10th from agents in our Tampa City Task Force

1 office that there was an interdiction of a large
2 quantity of cocaine in a vehicle from California, and
3 they advised me that the two individuals that were
4 occupying the vehicle were cooperating and that they
5 wished to assist law enforcement in conducting a
6 controlled delivery.

7 Q. And that was Jorge and Lorez Santos, correct?

8 A. That's correct.

9 Q. And they eventually provided information which led
10 to the DEA and yourself arresting Juan Ocasio on the
11 evening of February 21st of 2007?

12 A. Yes.

13 Q. Please describe for the Court what led to the arrest
14 of Mr. Ocasio on February 21st, 2007?

15 A. Um, we conducted a controlled delivery on February
16 15th. As a result of that controlled delivery, we
17 arrested one individual, Johan Farias, J-O-H-A-N,
18 Farias, F-A-R-I-A-S, in Lawrence. He physically took
19 custody of the load vehicle that was utilized by the
20 Santoses and he drove it back to an address, 43 Boxford
21 Street in Lawrence.

22 Following his arrest, in an interview of him, we
23 responded to an address at 82 Boxford Street, which is
24 the residence of Mr. Ocasio. We obtained consent to
25 search the residence and as a result of that consent

1 search, we discovered some items in the garage area that
2 were consistent with packaging that we seized during the
3 arrest of the Santoses in Kansas City. Specifically the
4 wrappings were in black duct tape with fishing wire
5 connecting them, which would make it easier for an
6 individual to remove all items from a hidden
7 compartment. Like I would compare it to sausage links,
8 you could grab one and pull them all out, because
9 they're attached to the fishing line. We discovered
10 that in the garage.

11 Q. After that evening of that consent search, who did
12 the DEA officially arrest for that delivery, it was the
13 Santoses and what additional individual?

14 A. Johan Farias.

15 Q. Fast forwarding to the evening of February 21st,
16 2007. Why was Mr. Ocasio arrested that evening?

17 A. He was arrested for his involvement as a result of
18 the discovery of the packaging from the garage and his
19 involvement with the controlled delivery. Specifically
20 we had observed him on surveillance. I had observed
21 him, several other agents had observed him, arriving on
22 the scene of where the -- the parking lot where the load
23 vehicle was parked. I have specific recollections with
24 respect to the observations I made on that day.

25 We observed him, at one point, exit out -- I, at

1 one point, observed him exit out of his vehicle he was
2 driving and glaring into me, or at me, or in my
3 direction of the vehicle I was parked with with two
4 other agents and officers.

5 Q. And using that information you gathered during the
6 investigation, there was an arrest warrant issued from
7 the U.S. Court in Boston, right?

8 A. I believe there was, yes.

9 Q. And that was for what you were arresting Mr. Ocasio
10 on?

11 A. Yes, sir.

12 Q. And that was the evening of February 21st of 2007?

13 A. That's when we arrested him. That's correct.

14 Q. What happened the next day, February 22nd, 2007?

15 A. The next day myself and a task force agent
16 transported Mr. Ocasio from a holding facility into the
17 U.S. District Courthouse. We brought him into the Sally
18 Port here in the building and we escorted him from the
19 Sally Port into the Marshal's lockup, the holding area.

20 Q. And was he -- please describe -- did he appear in
21 cuffs or leg shackles? Please describe that.

22 A. At that point, no, he was in our custody and he was
23 in handcuffs that were behind his back. We escorted
24 him -- I escorted him with the other task force agent
25 into the holding area and he was placed with the Deputy

1 Marshal, he was placed into a holding cell at the far
2 end of the marshals' lockup area.

3 Q. Please describe for the Court in detail how that
4 transport happened, once you got Mr. Ocasio into the
5 cell block downstairs in this building, what transpired?

6 A. I made contact with the marshals that were present
7 and I -- I was accompanied by one Deputy Marshal and we
8 followed the Deputy Marshal into the lockup. We opened
9 the door, entered, followed by Mr. Ocasio, myself, the
10 task force agent with me. We then entered the lockup
11 that the Deputy Marshal directed us which cell he wanted
12 him to be placed. I believe it was the last one on the
13 right. We then entered and at one point the Deputy
14 Marshal conducted a personal search of Mr. Ocasio. I
15 was present to watch. And then during that time, when
16 we passed in front of one of the cells, I noticed that
17 there was our cooperating defendant present. He was
18 present inside the cell block. I believe it was the
19 very first cell block that we passed through.

20 Q. So is it fair to say that by this point in time --

21 THE COURT: I'm sorry. Did you say a
22 cooperating defendant was present?

23 THE WITNESS: He was, your Honor.

24 THE COURT: Who was that?

25 THE WITNESS: Jorge Santos.

1 A. And he was -- for clarification?

2 Q. Sure. Can you explain what he was doing there?

3 A. He was seated within the first cell block lockup,
4 within the cell itself. I believe he was sitting down
5 on the bench at the time we entered the holdup area.
6 As we passed him, I glanced over and saw him and then he
7 then approached me. I told him, at that point, that
8 there was a detention hearing for him later that
9 morning.

10 Q. Now, at this point, this first conversation you had
11 with Mr. Santos, where was Mr. Ocasio during the
12 pendency of that conversation?

13 A. He was being escorted into the last cell within the
14 marshals lockup.

15 Q. Had he passed Jorge Santos's cell such as you did?

16 A. Yes, he would have had to. Mr. Santos's cell was
17 the one he was in at the time, it was the first cell
18 that we passed, and then Mr. Ocasio was being placed
19 into the last cell. At that point, as the Deputy was
20 escorting him in, Mr. Santos approached me at the gate.

21 Q. At the bars?

22 A. Correct.

23 Q. What if any conversation did you have with
24 Mr. Santos at that time?

25 A. I explained to him that he had a detention hearing

1 later that morning, that we would see him in court, and
2 just to sit tight.

3 Q. What happened next?

4 A. I then went back to the cell where Mr. Ocasio was
5 with the Deputy Marshal, he was completing the search at
6 the time. And then following that, I believe there was
7 a conversation about getting Mr. Ocasio's fingerprints.
8 So the Deputy Marshal then escorted Mr. Ocasio back out
9 of the holding cell and into another processing room
10 within the marshals' area outside the view of the lockup
11 where fingerprints and processing -- they're taking
12 photographs and fingerprints. As we were exiting,
13 Mr. Ocasio and the Deputy left the room and I was
14 gestured at by Mr. Santos from inside the cell.

15 Q. About how much time transpired from this second
16 gesture to the first conversation you had with
17 Mr. Santos?

18 A. I would say the whole incident occurred in less than
19 5 minutes. I would probably say it was between 1 and 5
20 minutes. It's -- well, that's an estimate.

21 Q. And so Mr. Santos gestures to you or waves to you as
22 you've reflected on the stand. So what did you do in
23 response to that?

24 A. I then approached the gate and Mr. Santos approached
25 the gate from inside.

1 Q. And what if anything happened?

2 A. We had a brief conversation and he was very
3 animated. He was doing this. (Indicates.)

4 Q. And you're pointing with your right hand?

5 A. I'm pointing with -- my right index finger is
6 pointing towards the exit of the holding area.

7 Q. And what if anything -- other than gestures such as
8 that, what if any verbal communication did he then give
9 you?

10 A. He then said to me, "That's the man," "That's the
11 man," and then he did this with his hands. (Indicates.)

12 Q. Describe what you're doing?

13 A. He held up his hand as if to be driving a vehicle,
14 like this. (Indicates.) He said, "That's the man who
15 we followed. He drove the blue car, the blue Chrysler
16 when we went to the house in Lawrence. That's the man
17 that we followed there." I said, "That man that just
18 passed you?" He said, "Yes." He further said, "That's
19 the man that we followed over to the hotel." I said,
20 the Laquita Hotel, that's the man you followed?" "Yes,
21 that's the man we followed down the driveway where the
22 guapa" --

23 Q. What is a "guapa"?

24 A. That's a colloquial expression in Spanish that I'm
25 told refers to a van, a bus, or a truck.

1 Q. Is that the full extent of the conversation that you
2 had with Mr. Santos in that second exchange?

3 A. Yes.

4 Q. Now, at the time of that second verbal exchange that
5 you had with Mr. Santos, how many times did Mr. Ocasio
6 pass by the cell -- the particular cell of Mr. Santos,
7 was it one time or two times?

8 A. Up until that second conversation, sir?

9 Q. Well, you first told the Court that, um, that
10 Mr. Santos came from the Sally Port -- I mean, that
11 Mr. Ocasio came from the Sally Port through the cell
12 block at which time he passed the cell of Mr. Santos,
13 correct?

14 A. That's correct.

15 Q. And then he was fingerprinted, photographed and put
16 into a cell?

17 A. That's correct.

18 Q. Did he pass by the cell of Mr. Santos a second time?

19 A. Well, I did not enter the holding area that -- I
20 guess that would be the third time he passed in front of
21 Mr. Santos's cell. The initial time was when we first
22 entered. He then passed in front of Mr. Santos's cell a
23 second time when the Deputy Marshals took him up for
24 fingerprinting. And then he would have to have been
25 escorted a third time, but I wasn't present for that.

1 He passed in front of me and I stayed outside. I did
2 not enter the holding cell on the -- I'll say the third
3 pass.

4 Q. So you were physically present and observed two
5 passes?

6 A. That's correct.

7 Q. After -- well, what do you do next? What do you do
8 after you conclude that conversation with Mr. Santos?

9 A. At that point myself and the task force agent, um --
10 I received my handcuffs from the Deputy Marshal. Um, I
11 then -- we then exited. I believe I went straight to
12 the U.S. Attorney's Office and I think that the other
13 task force agent -- we had a vehicle in there, so we had
14 to pull it out of the Sally Port. So we made
15 arrangements to get our vehicle out of the Sally Port
16 and then I went up to the ninth floor to the U.S.
17 Attorney's Office.

18 Q. What happens later that day that was relevant to
19 this case?

20 A. Well, I notified AUSA Connolly of what had
21 transpired in --

22 Q. When did that happen?

23 A. It was the same day. I believe it was prior to the
24 next detention hearing. So I believe it was pretty much
25 right after the incident happened. I explained that

1 there was an identification down in the lockup. Um,
2 then the next event was we had the detention hearing, so
3 myself and Mr. Connolly walked down to the magistrate's
4 court, and at that point I believe it was a little after
5 11:00 a.m., 11:10, I believe, and that was a detention
6 hearing for Mr. and Mrs. Santos in front of the
7 magistrate judge.

8 Q. And were they subsequently released after that
9 hearing?

10 A. They were, they were ordered released on electronic
11 monitoring and allowed to return home to Los Angeles.

12 Q. What if any -- after they -- after their detention
13 hearing or their release hearing concluded, what if any
14 other contact did you have with Jorge and Lorez Santos?

15 A. I met with the Santoses, with Mrs. Santos's
16 attorney, down at the coffee shop in the courthouse.

17 Q. And who was representing Mr. Santos? Did you say
18 Mr. or Mrs. Santos?

19 A. Mrs. Santos. It was Mr. George Gormley.

20 Q. He was the defense attorney for Lorez Santos?

21 A. That's correct.

22 Q. And you met him and Lorez and Jorge down at the
23 coffee shop?

24 A. I did, and also present was task force agent, James
25 Fay. So we sat down at the coffee table -- we sat down

1 within the coffee shop. Excuse me.

2 Q. Now, what time was this, if you know, approximately?

3 A. It was roughly -- it was after 1:00 p.m. that same
4 day. Somewhere between 1:00 and 1:30.

5 Q. And the Santoses had previously been released from
6 lockup?

7 A. They had.

8 Q. What was the purpose of this coffee shop meeting?

9 A. Um, I wanted to meet with them, I wanted to show a
10 photo array, and I had to make arrangements to transport
11 Mr. and Mrs. Santos to Logan Airport so they could fly
12 home. I sat down with them, Mr. Gormley --

13 Q. Explain to the Court why the meeting was happening
14 in the -- now, you say -- is it the coffee shop on the
15 first floor or Sebastian's on the second?

16 A. No, it was the first floor coffee shop. So I wanted
17 to meet with them. It was my last chance to really talk
18 with them, face to face, before they returned to Los
19 Angeles. So I wanted to meet with them and I wanted to
20 show them some photos and I wanted to make sure that
21 they -- logistically to get them from the courthouse to
22 Logan Airport for their flight that was leaving there
23 that afternoon.

24 Q. Explain why you decided to conduct the array at the
25 coffee shop on the first floor?

1 A. It was the most expeditious place to conduct it at
2 the time. I wanted to get them on the flight soon. I
3 knew we had another detention -- excuse me, an initial
4 appearance for Mr. Ocasio that day, so we didn't have a
5 great deal of time. And so that's why I wanted to do it
6 that way.

7 Q. And would you describe for the Court what occurred
8 in the coffee Shop that afternoon?

9 A. Mr. and Mrs. Santos sat down, they sat down at two
10 individual separate tables. I then explained to them
11 that I was going to be showing them the photo array and
12 that my instructions were very clear. I said, "You are
13 both about to view some photos. You may or may not
14 recognize anyone in these arrays. Their appearance may
15 have changed since these photos were taken. If,
16 however, you do identify anyone, I would like you to
17 circle the individual number of the picture and sign the
18 array."

19 Q. Now, are they both -- did you have to instruct them
20 twice or did you instruct them both together?

21 A. I instructed them one time. They were both
22 together.

23 Q. Describe in detail for the Court how they were
24 sitting next to each other?

25 A. I had Mrs. Santos sitting to my right facing me.

1 She was at a table. The tables are small. It's a
2 coffee shop. They're very small tables. To my left --
3 at approximately 5 to 6 feet to my left, I had
4 Mr. Santos sitting at a coffee table as I gave these
5 instructions once.

6 Q. And they were on the same side of the table,
7 correct, they were shoulder to shoulder at the time?

8 A. Yes, they were shoulder to shoulder, sitting down,
9 facing me. My recollection is that Mr. Gormley was
10 seated next to Mrs. Santos. When I produced them the
11 arrays, I did it simultaneously and I was very careful
12 to look them in the eyes as I did so. I wanted to make
13 sure -- I wanted to ensure that they were not conferring
14 at any time, that they did not say a number or say,
15 "Hey, this looks like one." I wanted to ensure that it
16 was not a bad identification. As I showed them the
17 arrays, I placed them down simultaneously in front of
18 them, 1, 2.

19 Q. So each of them had their own copy of an identical
20 array?

21 A. That's correct. They were identical arrays.

22 Q. And what happened after you did that, after you
23 placed these arrays in front of Mr. and Mrs. Santos?

24 A. I saw both Mr. Santos and Mrs. Santos circle an
25 image on the array and I instructed them, "If you have

1 identified anyone, please sign the array. There's a
2 signature block." I then took custody of the arrays.
3 Agent Fay signed one. I signed one. Agent Fay signed
4 the other. And Mrs. Santos may have messed up and
5 signed where my signature was supposed to be. And then
6 I took custody of the arrays.

7 Q. About how long did this array process take from the
8 moment they sit down at the coffee shop table on the
9 first floor of the building until you collect the
10 arrays?

11 A. I would conservatively estimate that when I showed
12 them the arrays, I would say within 5 seconds they began
13 writing on the arrays.

14 Q. And did they each identify the same person on the
15 array?

16 A. They did, they circled the photo numbered -- marked
17 Number 5.

18 Q. And the person they each identified at that time was
19 Juan Ocasio?

20 A. Yes, sir.

21 Q. About how much time transpired, if you know, between
22 the time Jorge Santos sees Mr. Ocasio in the lockup and
23 the coffee shop photo array identification?

24 A. That was at 9:45 and the coffee shop identification
25 was roughly between 1:00 and 3:00.

1 Q. What happens after the conclusion of this coffee
2 shop photo array identification?

3 A. Um, I told Mr. Gormley that we were going to be
4 taking his client and the other, Mr. Santos, over to
5 Logan. We would transport them over to Logan and I
6 wanted to -- that's why I had Agent Fay there with me to
7 assist me in that. We then drove them over to Logan,
8 dropped them off, um, and then I -- actually, I want to
9 correct that. I'm not sure if I physically drove with
10 them or if Agent Fay did, to the airport. I can't
11 recall if I physically went with them to Logan or if I
12 just told Agent Fay, "Why don't you take care of that."

13 Q. Now, what happened to the -- well, there was another
14 detention hearing later in that day, correct, or an
15 initial appearance for Mr. Ocasio?

16 A. Yes.

17 Q. Were you present at that?

18 A. I was.

19 Q. And that was later in the afternoon on the same day,
20 February 22nd, '07, correct?

21 A. Yes.

22 Q. And when do you alert AUSA Connolly about the
23 results of the coffee shop photo array?

24 A. I can't specifically recall if I told him that day
25 they identified, but I would say that it was within

1 days. I spoke with him that day about the lockup
2 identification, but I don't recall if I said, "Yeah,
3 they identified him in a photo array," that day or if it
4 was within the following days.

5 Q. Did AUSA Connolly provide you with any instructions
6 as to the lockup identification?

7 A. He did.

8 Q. What were his instructions?

9 A. He said, "You need to write a report regarding that
10 and that's important."

11 THE COURT: When did he tell you that?

12 THE WITNESS: I would say he told me that
13 either that day or within days, I needed that report.

14 THE COURT: So he told you the day of the --
15 the day that it occurred or within a couple of days?

16 THE WITNESS: Correct, the day that it
17 occurred or within a couple of days that week.

18 THE COURT: And what day did the events in the
19 lockup occur?

20 THE WITNESS: Um, that was February 22nd of
21 2007.

22 Q. And just to be clear, that was the same day of the
23 coffee shop photo array?

24 A. That's correct.

25 Q. The same day that the Santos had a release hearing

1 in front of Magistrate Judge Alexander, correct?

2 A. That's correct.

3 | Q. And were released?

4 A. Correct.

5 Q. And that Mr. Ocasio had been brought to the
6 courthouse for his initial hearing?

7 A. Correct.

8 MR. FISHER: May I approach, your Honor?

THE COURT: Yes.

10 Q. Special Agent O'Shaughnessy, I'm handing you what's
11 marked Exhibit Number 1. Would you take a look at that,
12 please.

13 A. (Looks.) Yes, sir. I'm holding Exhibit 1, a report
14 that I wrote concerning the photo array identifications
15 on February 22nd. It's signed by me.

16 Q. Do you recognize that as the DEA 6 you drafted to
17 memorialize the coffee shop identification?

18 A. Yes, sir.

19 Q. And that's marked Government Exhibit Number 1?

A. Yes, it is.

21 | Q. When did you draft that report?

22 A. I drafted it on March 2nd, 2007.

23 Q. In that report, in, I believe, the second paragraph,
24 you use the word "separately"?

25 A. I did.

1 Q. Can you please explain in detail for the Court what
2 you meant when using the word "separately" in that
3 sentence in that portion of the report?

4 A. Sir, I used the word "separately" to convey my point
5 that they were not shown the same individual photo
6 array, but rather two distinctly separate, although
7 identical, arrays. So I didn't show the two individuals
8 one array so that they could view them --

9 Q. You mean together.

10 A. Together. I also used that word to, um, indicate or
11 to demonstrate that they were not sitting at the same
12 table physically looking at it, at the same table. I
13 just wanted to make the distinction that they were at
14 separate tables and they were viewing, although
15 identical, two separate photo arrays.

16 Q. And that report, after you drafted it, you, as a
17 policy, turned that into your supervisor and had it
18 signed?

19 A. I did.

20 Q. And you provided that to Attorney Connolly, correct?

21 A. I did.

22 Q. Why didn't you include, in that report, the
23 information about the lockup ID?

24 A. That was a separate event.

25 Q. And when did you draft the report for that event?

1 A. I drafted that report months later. The specific
2 date --

3 MR. FISHER: May I approach, your Honor?

4 THE COURT: Well, let's see if he's exhausted
5 his recollection. I think maybe not.

6 A. I specifically recall preparing that report on
7 October 29th of 2007.

8 MR. FISHER: May I approach, your Honor?

9 THE COURT: Why? What's the question?

10 MR. FISHER: May I approach, your Honor?

11 THE COURT: No. I want to know why. Ask a
12 question. Is there something you want to show him?

13 MR. FISHER: I did want to show him something.

14 THE COURT: Well, first of all, you'll have to
15 use the document presenter. Second of all, I don't know
16 whether it's necessary or appropriate to show him his
17 report right now.

18 (Pause.)

19 THE COURT: Well, the document presenter is
20 not working. But what's the question?

21 Q. Special Agent O'Shaughnessy, you testified that you
22 drafted that report in October of 2007?

23 A. Yes.

24 Q. Why the delay?

25 A. Well, the simple answer is I forgot. I was -- AUSA

1 Connolly told me, within days, to write the report. He
2 then reminded me -- I do remember him reminding me, at
3 least two other times, to write the report. I might add
4 that this whole investigation began during the middle of
5 a wiretap investigation which I was the affiant. There
6 was a lot going on. I had 10-day reports and 20-day
7 reports. I neglected to write it within the proper
8 amount of time. And I forgot. He reminded me
9 subsequent to that. I do remember that. And with all
10 the other reports and other responsibilities I had, I
11 forgot.

12 Q. But, in fact, you testified that you had alerted
13 AUSA Connolly to the fact that a lockup ID had happened,
14 correct?

15 A. I did. It was that day.

16 Q. And you had a helpful conversation with him about
17 drafting the report, correct?

18 A. I did.

19 Q. Did you bring a copy of that report with you today?

20 A. I did.

21 MR. FISHER: May I approach, your Honor?

22 THE COURT: To do what?

23 MR. FISHER: To enter the report into
24 evidence.

25 THE COURT: Well, you already entered both of

1 them into evidence. That's Exhibit 2, isn't it?

2 MR. FISHER: It is. I didn't know if you
3 wanted me to do it officially with him identifying it.
4 That's the only reason I'm asking him.

5 THE COURT: Go ahead. You can show it to him.

6 Q. Special Agent O'Shaughnessy, I'm showing you what's
7 marked Exhibit 2. Would you take a look at that and
8 tell us if you recognize what that is?

9 A. Sir, I recognize this as the report that I prepared
10 concerning the lockup identification which occurred on
11 February 22nd, 2007.

12 Q. And as per DEA policy, you turned that into your
13 supervisor and had that signed off on, correct?

14 A. I did.

15 MR. FISHER: No further questions, your Honor,
16 regarding these issues.

17 THE COURT: Well, you may want to look in your
18 file. Do you have any notes or other information that,
19 in the context of the testimony we just heard, reflects
20 prior inconsistent statements?

21 MR. FISHER: On behalf of who?

22 THE COURT: Well, prior inconsistent
23 statements of this witness or anybody else who provided
24 information that would contradict the information that I
25 just heard?

1 MR. FISHER: You mean any other DEA 6 report?

2 THE COURT: No, any other information. Any
3 notes. You told me that you've retained the notes and
4 reviewed them.

5 MR. FISHER: I did, correct.

6 THE COURT: You need to look in your file to
7 see whether there's anything, any information that is
8 inconsistent with what I just heard, because if it is,
9 you need to turn it over.

10 MR. FISHER: The notes which Special Agent
11 O'Shaughnessy drafted were turned over to my brother. I
12 have them. I've reviewed him. They reflected the
13 lockup ID, which was then generated within.

14 THE COURT: Well, let me have the notes. I'll
15 take those notes.

16 MR. FISHER: Yeah, I didn't bring my copy of
17 the notes. My brother may have his.

18 THE COURT: What about Mr. Fay, did you talk
19 to him about this matter?

20 MR. FISHER: I can ask Special Agent
21 O'Shaughnessy --

22 THE COURT: No, did you talk to him about this
23 matter?

24 MR. FISHER: Did I talk to Special Agent
25 O'Shaughnessy?

THE COURT: Okay. Who was present for the identification?

3 THE WITNESS: Task Force Agent Fay for the
4 photo identification.

5 THE COURT: By what agency is he employed?

6 THE WITNESS: He's currently employed with the
7 Lowell Police Department.

8 THE COURT: So my question is, which I also
9 asked you last week, have you talked to Mr. Fay?

10 THE WITNESS: No.

11 THE COURT: You still haven't talked to
12 Mr. Fay. So you don't know whether Mr. Fay would
13 contradict anything that Agent O'Shaughnessy said in his
14 DEA 6s or in his testimony today?

15 MR. FISHER: I am not aware of any information
16 that TFA Fay has regarding that --

17 THE COURT: No, that's not correct. That's
18 not the question I asked you. I went over this with you
19 on May 27th. You have an obligation to go to each
20 agency, like the Lowell Police, and the people with
21 knowledge, and ask them.

22 MR. FISHER: Your Honor, the reason I didn't
23 do that, since May 27th, your Honor, is because we made
24 the decision to dismiss the underlying case.

25 THE COURT: Look, I gave you orders and I

1 asked you this morning whether you -- it's in the
2 transcript, whether you got all the notes, whether you
3 produced all material exculpatory evidence by June the
4 1st, and you didn't tell me previously, "No, we didn't
5 obtain and produce all exculpatory evidence by June the
6 1st, because we decided to dismiss the case." I don't
7 see --

8 MR. FISHER: What I did was I gathered all
9 notes and redacted information which had to do with
10 other investigations and then I turned them over to my
11 brother.

12 THE COURT: Did you ask Mr. Fay if he had any
13 notes?

14 MR. FISHER: Special Agent O'Shaughnessy asked
15 Mr. Fay if he had any notes.

16 THE COURT: Yeah, it's your obligation. Do
17 you remember we went over this last week? Well, that's
18 one. Two, do you recall that you said, on May 27th,
19 that you understood that you had an obligation to obtain
20 and disclose material exculpatory evidence, including
21 impeaching evidence, even if it wasn't written down?

22 MR. FISHER: I did, your Honor, but because I
23 didn't -- I wasn't going to present evidence -- I wasn't
24 going to present any evidence, so --

25 THE COURT: I gave you an order. You said you

1 understood it. I didn't relieve you from the order.
2 And you told me earlier that you obeyed it, that you
3 produced all material exculpatory evidence by June 1.

4 MR. FISHER: Correct.

5 THE COURT: That's what you said.

6 MR. FISHER: That's what I said and that's
7 what I believe I did. I spoke to the agent who
8 collected every piece of paper throughout the case and I
9 turned it over to my brother. However, at that time, I
10 didn't anticipate having an evidentiary hearing. I
11 didn't plan on calling -- I didn't ask to call this
12 witness.

13 THE COURT: Well, you filed it about noon on
14 June 4th, a motion to dismiss, a request a dismiss, and
15 nobody asked me to alter the order I gave you. So as
16 far as I'm concerned, you just disregarded the order.

17 Now --

18 MR. FISHER: I didn't --

19 THE COURT: What I'm doing is offering you now
20 an opportunity to go through your files to see whether
21 there's anything you should give me that might impeach
22 anything I've heard. You may feel you don't need to do
23 that. But I just want to make sure I have what I need
24 to ask the questions I'm going to ask.

25 MR. FISHER: If the Court would like, since I

1 provided them to my brother, I could provide the notes
2 to you.

3 THE COURT: I've asked for the notes.

4 MR. FISHER: Yes.

5 (Hands up.)

6 THE COURT: Whose notes are these?

7 MR. FISHER: They are Special Agent
8 O'Shaughnessy's. I can show them to him. But those are
9 the ones that were provided to me from him.

10 THE COURT: All right. But did you take notes
11 prior to sending the letter to Mr. Fick on May 22nd,
12 2008?

13 MR. FISHER: I did not.

14 THE COURT: And did the letter reflect what
15 you told -- what Mr. O'Shaughnessy told you previously?

16 MR. FISHER: It does reflect that.

17 THE COURT: All right. It's my view that you
18 haven't obeyed my order and looked for all material
19 exculpatory information. But I understand you to be
20 representing that you've disclosed what you had?

21 MR. FISHER: Yes.

22 THE COURT: You have a continuing obligation,
23 if in going through your file, you find additional
24 information that would be impeaching, I'm ordering you
25 to give it to me, even if it turns out the case has been

1 dismissed. Do you understand?

2 MR. FISHER: I do understand.

3 THE COURT: All right. Mr. O'Shaughnessy, I'm
4 going to ask you some questions that I -- that relate to
5 the decision I need to make as to whether it's
6 appropriate to dismiss the case against Mr. Ocasio as
7 has been requested.

8 THE WITNESS: Yes, your Honor.

9 THE COURT: Do you understand that you, like
10 any witness, have a right under the Fifth Amendment not
11 to answer any question if the answer to that question
12 might tend to incriminate you?

13 THE WITNESS: I do.

14 THE COURT: Do you understand that making --
15 knowingly and willfully making a false material
16 statement in a report like a DEA 6, at least in my view,
17 would be a prosecutable offense under 18 United States
18 Code, Section 1001?

19 THE WITNESS: I'm aware of that.

20 THE COURT: So if at some point, because you
21 think you have a valid Fifth Amendment right that you
22 want to exercise, you don't want to answer a question,
23 do you understand that you should just tell me that?

24 THE WITNESS: I do.

25 THE COURT: Did you receive -- well, let me

1 see. Who have you talked to about matters relating to
2 this case since May 27th?

3 THE WITNESS: The prosecutors. The AUSA in
4 this case. Mr. Fisher. A FLEOA attorney.

5 THE COURT: Who is that?

6 THE WITNESS: A FLEOA attorney.

7 THE COURT: What is FLEOA?

8 THE WITNESS: It's the Federal Law Enforcement
9 Officer's Association. It's a fraternal order. I
10 discussed the case with him.

11 THE COURT: Okay.

12 THE WITNESS: I advised my supervisor that I
13 had a sequestration order. But those are the attorneys
14 that I spoke with.

15 THE COURT: Have you talked to anybody other
16 than an attorney?

17 THE WITNESS: No other witness. No, sir.

18 THE COURT: Okay. Have you talked to
19 Mr. Fay?

20 THE WITNESS: I have not.

21 THE COURT: Did you say you began your career
22 in Federal law enforcement as a Customs Agent?

23 THE WITNESS: I did, sir.

24 THE COURT: And you were trained in Glen Cove,
25 Georgia?

1 THE WITNESS: Yes.

2 THE COURT: For about how long?

3 THE WITNESS: Approximately 4 months.

4 THE COURT: And did that training include
5 training on how and when to write reports of your
6 activities?

7 THE WITNESS: It did, sir.

8 THE COURT: Do you recall what things were
9 emphasized as being particularly important in writing a
10 law enforcement report?

11 THE WITNESS: Yes.

12 THE COURT: What?

13 THE WITNESS: The events that occurred. The
14 statements that are made. Above all to report the truth
15 and report it accurately and succinctly.

16 THE COURT: I'm sorry. What was the last
17 thing you said?

18 THE WITNESS: Accurately and succinctly. To
19 be thorough. And to report things on a timely basis.

20 THE COURT: So accuracy was emphasized as
21 being important?

22 THE WITNESS: It was, sir.

23 THE COURT: And preparing reports on a timely
24 basis was emphasized as being important?

25 THE WITNESS: It was, sir.

1 THE COURT: And being truthful was emphasized
2 as being important?

3 THE WITNESS: Yes, sir.

4 THE COURT: And did Customs have standards and
5 procedures with regard to how quickly after events
6 reports were to be prepared, during the period you were
7 a Custom's agent?

8 THE WITNESS: Yes.

9 THE COURT: And in terms of how quickly a
10 Customs investigative report was to be prepared, what
11 was the time period, if any?

12 THE WITNESS: I don't specifically recall what
13 exact -- how many days or how many incidents. I don't
14 specifically recall. That agency wasn't as regimented
15 as the DEA is. But I do know that it was in a timely
16 manner.

17 THE COURT: For Customs?

18 THE WITNESS: For Customs.

19 THE COURT: In your training as a Customs
20 agent, were you trained in conducting identification
21 procedures?

22 THE WITNESS: I believe it came up, yes.

23 THE COURT: Do you recall what you were
24 instructed in that training?

25 THE WITNESS: Um, I don't recall -- it was a

1 long time ago. I don't recall photo arrays or -- I
2 remember we discussed lineups, photo arrays, show-ups,
3 um, but I don't have any specific recollection
4 concerning the procedures.

5 THE COURT: And how long did you serve as a
6 Customs agent?

7 THE WITNESS: Approximately 7 years.

8 THE COURT: Did you conduct any identification
9 procedures as a Customs agent?

10 THE WITNESS: I -- I'm sure I was present
11 during them. I don't have specific recollection
12 concerning a number. I don't recall exactly if I've
13 done one before as a Customs agent.

14 THE COURT: Were you instructed as a Customs
15 agent in Glen Cove or anyplace else as to whether
16 identification procedures should be conducted separately
17 or together if there was more than one witness being
18 asked whether he or she could make an identification?

19 THE WITNESS: I don't recall.

20 THE COURT: When did you become a DEA agent?

21 THE WITNESS: November of 1997.

22 THE COURT: And did you say you were trained
23 at Quantico as a DEA agent?

24 THE WITNESS: I was, sir.

25 THE COURT: Were you trained with regard to

1 making reports of your activities?

2 THE WITNESS: Yes.

3 THE COURT: And what were you taught was
4 particularly important in connection with making
5 reports?

6 THE WITNESS: Among other things, that I had
7 approximately 5 days, 5 to 7 days to generate and
8 prepare a report. The dates are slightly different for
9 certain reports. Um, a case initiation report and a CS
10 debriefing report, you are instructed in the manual to
11 prepare and generate a report within 5 days. If it's
12 any other report, it's within 7 days.

13 THE COURT: And other than time, do you recall
14 being taught that certain other things were important in
15 preparing DEA reports?

16 THE WITNESS: Yes, your Honor.

17 THE COURT: What?

18 THE WITNESS: Similar to, as a Customs agent,
19 to be truthful, articulate, thorough.

20 THE COURT: And accurate?

21 THE WITNESS: And accurate.

22 THE COURT: And did you receive at Quantico or
23 anyplace else, as a DEA agent, instruction on conducting
24 identification procedures?

25 THE DEFENDANT: I know we discussed them. I

1 know we didn't do any practical exercises. I don't
2 recall that. But I'm sure we must have talked about
3 them and been instructed about them, about photo
4 identifications, lineups and show-ups. I'm sure we
5 discussed that.

6 THE COURT: When you use the term "show-up,"
7 what are you describing?

8 THE WITNESS: If you have a witness, um, to a
9 crime and you have individuals that are on the street,
10 um, you can ask that person and say, "Do you recognize
11 anybody here?" I believe that's a "show-up". I believe
12 that's what I was referring to.

13 THE COURT: Does a DEA agent, is there a
14 manual of standards and procedures available to you?

15 THE WITNESS: There is, sir.

16 THE COURT: And is there a section in that
17 manual on identification procedures?

18 THE WITNESS: There is.

19 THE COURT: Have you read it?

20 THE WITNESS: I read it -- I've read it
21 recently, yes.

22 THE COURT: Did you read it before February
23 22nd, 2007?

24 THE WITNESS: I don't believe I did, sir.

25 THE COURT: Are there forms that DEA has

1 for -- to be used in connection with conducting
2 identification procedures?

3 THE WITNESS: I believe there are forms now.

4 THE COURT: Were there forms in February of
5 2007?

6 THE WITNESS: I don't recall if there were,
7 your Honor. I'm not sure if they were generated after.
8 Our agent's manual does change. We have updates. I
9 just do not recall if there was a form that was
10 generated prior to February of '07.

11 THE COURT: Did you read Mr. Ocasio's motion
12 to suppress tainted identification procedures?

13 THE WITNESS: Um, I read the sequestration
14 order. Um --

15 THE COURT: This is a motion that was filed on
16 about June 9, 2008. About a year ago.

17 THE WITNESS: I don't recall reading it.

18 THE COURT: Were you told it was filed?

19 THE WITNESS: I was.

20 THE COURT: Did you discuss it with Mr. Fick
21 or some other prosecutor?

22 THE WITNESS: I discussed it with the
23 prosecutor, yes.

24 THE COURT: Not Mr. Fick. I misspoke.
25 Mr. Fisher.

1 THE WITNESS: Yes, sir.

2 THE COURT: Did you look at any of the
3 attachments to the motion?

4 THE WITNESS: I don't believe I did.

5 THE COURT: Does somebody have a copy of the
6 motion with the attachments? Here, Dennis, just show
7 him.

8 I'm going to show him the last page, it says
9 "Photo Identification Procedure."

10 (Shows.)

11 THE COURT: Which I'll make Exhibit 3.

12 (Exhibit 3, marked.)

13 THE WITNESS: (Reads.)

14 THE COURT: Take whatever time you need to
15 read it, but the question I'm going to ask you is
16 whether you've seen that form before or forms
17 substantially like it?

18 THE WITNESS: I've seen this form before.

19 THE COURT: When did you see it? When did you
20 first see it?

21 THE WITNESS: Thursday of last week.

22 THE COURT: Had you ever seen it before
23 February 22, 2007?

24 THE WITNESS: I don't recall ever reading the
25 identification procedure within the manual.

1 THE COURT: Who showed you the form last week?

2 THE WITNESS: Mr. Fisher.

3 THE COURT: Was that before or after the
4 hearing on May 27th?

5 THE WITNESS: It would have been after.

6 THE COURT: Okay. And look at Paragraph 4 of
7 that document, please.

8 THE WITNESS: Yes, sir.

9 THE COURT: Can you read what I think is the
10 second part of that paragraph that has some -- it has
11 two words in all capital letters.

12 THE WITNESS: Yes.

13 THE COURT: Please read it out loud.

14 THE WITNESS: "Where there is more than one
15 witness, each should view photos separately, not in each
16 other's presence." The word "separately" is in all
17 caps. The word "not" is in all caps.

18 THE COURT: All right. Do you recall whether
19 you've ever received those instructions in your training
20 or experience as a Customs agent or DEA agent?

21 THE WITNESS: I don't recall if I have. I
22 just --

23 THE COURT: Have you looked to see whether
24 that form or those instructions are in the DEA manual?

25 THE WITNESS: I have. I looked it up in the

1 manual and it's accurately reflected on this page.

2 THE COURT: So what you just read is now in
3 the DEA manual?

4 THE WITNESS: It is now, sir.

5 THE COURT: Did you check to see whether the
6 effective date that the provision indicated, whether it
7 was in the DEA manual before February 22 of 2007?

8 THE WITNESS: Your Honor, I do remember
9 looking for it, I just -- I couldn't find it on that.
10 It's automated, so I couldn't find it on the sheet that
11 I was reviewing, when the effective date was.

12 THE COURT: Well, for some purposes, the
13 Department of Justice puts the dates on. For example,
14 Section 9-5.001 of the U.S. Attorney's manual says it
15 was updated in October, 2008.

16 All right. I'm going to have to get that back.

17 (Gets back.)

18 THE COURT: Where it says what you just read,
19 "Where there is more than one witness, each should view
20 photos separately, not in each other's presence." Does
21 that communicate to you that the Drug Enforcement
22 Administration interpret "separately" to mean not in the
23 presence of another person also being asked to make an
24 identification?

25 THE WITNESS: Yes, it does.

1 THE COURT: All right. Have you, since May
2 27th, discussed with Mr. Fisher why you wrote
3 "separately" in the DEA 6 report, that's Exhibit 1, when
4 the Santoses were in each other's presence when they
5 were asked to make identifications?

6 THE WITNESS: We've discussed that before and
7 after the May hearing of last week.

8 THE COURT: And do you generally understand
9 the word "A," as in "a" person, to mean one person and
10 not more than one person?

11 THE WITNESS: I do, your Honor.

12 THE COURT: Is that how you usually use the
13 term "a"?

14 THE WITNESS: "A" refers to singular versus
15 the plural.

16 THE COURT: Now, please tell me again. When
17 you had the Santoses in the coffee shop, who was present
18 and how each person was seated or placed?

19 THE WITNESS: Your Honor, yes. Task Force
20 Agent James Fay. Myself, obviously. Mr. and
21 Mrs. Santos. And Mr. Gormley. (Indicates.)

22 THE COURT: Okay. You're going to have to
23 explain it in words, because it has to be reflected on
24 the record and I'm having trouble following your hands
25 with that computer screen there.

1 THE WITNESS: Sure. I apologize, your Honor.
2 Task Force Agent Fay, myself, Mr. and Mrs. Santos and
3 Mr. Gormley were present. Um, I sat in front of both
4 Mr. Santos and Mrs. Santos as they sat at a table in the
5 coffee shop.

6 THE COURT: So you were across the table from
7 them?

8 THE WITNESS: I was across. There were two
9 separate tables. They were seated at an individual
10 table, each of them, and the tables are fairly small.
11 Almost the size of a student's desk, I would say. They
12 sat across from me. They were approximately 5 to 6 feet
13 in distance from one another. I sat directly across
14 from them in the middle. As I looked, I had Mr. Santos
15 on my left. My recollection is that I had Mrs. Santos
16 on my right. And my recollection is that I had
17 Mr. Gormley also was seated at a table in the coffee
18 shop. Task Force Agent Fay was seated somewhere behind
19 me or to the left of me to witness this. Outside of the
20 proprietor of the coffee shop, I didn't observe any
21 other people there. I don't recall any other people
22 being there. Um --

23 THE COURT: Okay. So there was nobody between
24 Mr. Santos and Mrs. Santos, correct?

25 THE WITNESS: I would say there was nobody

1 present. I was seated across from them in front, so I
2 would say there was no one physically seated between the
3 two.

4 THE COURT: And you say these were small
5 tables?

6 THE WITNESS: Yes.

7 THE COURT: Were the tables touching each
8 other or was there a space between the tables?

9 THE WITNESS: Definitely a space between the
10 two.

11 THE COURT: How big a space?

12 THE WITNESS: As I said about, roughly, 5 to 6
13 feet in distance, approximately.

14 THE COURT: And did you testify earlier that
15 the Santoses were shoulder to shoulder?

16 THE WITNESS: I don't recall saying the phrase
17 "shoulder to shoulder" earlier in my testimony.

18 THE COURT: Have you ever described them as
19 being "shoulder to shoulder"?

20 THE WITNESS: In a report or in testimony,
21 your Honor? Just for clarification.

22 THE COURT: Have you ever -- it doesn't have
23 to be a report or testimony. Have you ever said, orally
24 or in writing, that the Santoses were "shoulder to
25 shoulder" during the procedure?

1 THE WITNESS: I don't recall if I have ever
2 uttered those words.

3 THE COURT: I think the record will -- were
4 they shoulder to shoulder?

5 THE WITNESS: They were not shoulder to
6 shoulder, they were not sitting -- their shoulders were
7 not physically in contact with one another during the
8 photo identification.

9 THE COURT: Were their shoulders near each
10 other?

11 THE WITNESS: Um, as they were seated?

12 THE COURT: Yeah.

13 THE WITNESS: Um, I'd say about 5 to 6 feet
14 apart. I guess that's --

15 THE COURT: Did you ever -- did you ever tell
16 Mr. Fisher that the Santoses -- here, were seated
17 "shoulder to shoulder during the identification
18 procedure"?

19 THE WITNESS: I don't recall what words I may
20 have used in the past in conversations with Mr. Fisher.

21 THE COURT: Did you read, at any time, the
22 letter that he sent Mr. Fick concerning this matter --

23 THE WITNESS: Um --

24 THE COURT: -- correcting and clarifying
25 whether the Santoses were separate or together when

1 their identification procedures were conducted?

2 THE WITNESS: I don't recall ever reviewing
3 that memo.

4 THE COURT: That Exhibit 3, the document on
5 the photo identification procedure.

6 THE WITNESS: That was just shown to me?

7 THE COURT: Yes.

8 THE WITNESS: Yes, your Honor.

9 THE COURT: When did you first read that?

10 THE WITNESS: I read it last week in
11 Mr. Fisher's office. It was either Thursday or Friday
12 of last week.

13 THE COURT: Was it a separate single piece of
14 paper or was it attached to something?

15 THE WITNESS: I can't recall. Um, I can't
16 recall if it was stapled or paper clipped. I don't
17 recall. I remember viewing it in his office.

18 THE COURT: Let me -- I'm trying to understand
19 your testimony. Is it your testimony that Mr. Santos
20 was at one table, Mrs. Santos was at another table, and
21 they were about 5 or 6 feet from each other even though
22 they were small tables?

23 THE WITNESS: That's correct.

24 THE COURT: And you simultaneously put
25 identical photo arrays, but there were two photo arrays

1 in front of each of them?

2 THE WITNESS: Yes, there was Photo Array 1,
3 Photo Array 2, they're identical, yes.

4 THE COURT: Where were you seated?

5 THE WITNESS: I was seated across from them
6 between -- I sat between them, um, across from their
7 chairs as they were facing me.

8 THE COURT: Were you at a table?

9 THE WITNESS: I believe I was seated. I don't
10 recall if there was a table in front of me. I don't
11 recall, sir.

12 THE COURT: But you recall that -- did you
13 have two photo -- two sets of the photo array?

14 THE WITNESS: Yes.

15 THE COURT: So in that sense there were two
16 photo arrays?

17 THE WITNESS: That's correct. Yes.

18 THE COURT: All right. And you gave them the
19 photo array simultaneously?

20 THE WITNESS: Yes, your Honor.

21 THE COURT: From a seated position?

22 THE WITNESS: I may have sat up in my chair to
23 reach over to either one, but my recollection is I was
24 seated.

25 THE COURT: Do you think you got a 6 foot wing

1 span?

2 THE WITNESS: From 5 to 6. I'm about 5 foot
3 10. They always told me that this was about my height.
4 (Indicates.) So I don't think I did this, but I --
5 well, I don't have a 6 foot wing span.

6 THE COURT: Yeah. And you could comfortably
7 put the two separate photo arrays down on each table?

8 THE WITNESS: Um, yeah, shifting a little
9 bit. Yes. I'm pretty flexible. (Indicates.)

10 THE COURT: And you don't remember saying
11 that: "The Santoses were seated next to one another,
12 shoulder-to-shoulder style."

13 THE WITNESS: I don't recall using those
14 words.

15 (Pause.)

16 THE COURT: Well, let's see if it refreshes
17 your recollection. Would you show him, please,
18 Mr. Fisher, your May 22, 2008 letter.

19 MR. FISHER: Do you want to have it marked,
20 your Honor, before I show it to him?

21 THE COURT: You can show it to him.

22 (Shows witness.)

23 THE COURT: Have you read that letter?

24 THE WITNESS: This is the first time I've seen
25 this letter. I've read it.

1 THE COURT: Do you see that it says: "The
2 cooperators were seated next to one another shoulder-to-
3 shoulder style"?

4 THE WITNESS: I do see that, sir.

5 THE COURT: Is it your position that you
6 didn't tell that to Mr. Fisher or just that you don't
7 remember saying that to Mr. Fisher?

8 THE WITNESS: It's my position, sir, that I
9 don't remember uttering the words "shoulder-to-shoulder
10 style" to Mr. Fisher.

11 THE COURT: Do you recall saying earlier in
12 your testimony, when Mr. Fisher was questioning you, and
13 asked: "And they were on the same side of the table?"
14 "Correct." "So they were shoulder to shoulder at the
15 time?" And answering, "Yes, they were shoulder to
16 shoulder facing me"?

17 THE WITNESS: Your Honor, if that's my
18 testimony, sir, I must have uttered it. I --

19 THE COURT: I'm talking about earlier today.

20 THE WITNESS: Earlier today? Um, if I uttered
21 those words, I didn't mean, when I said that, that their
22 shoulders were physically in contact, but that their
23 shoulders were aligned or facing in the same direction.

24 THE COURT: Well, why don't we mark that
25 letter as Exhibit 4.

1 | (Exhibit 4, marked.)

2 THE COURT: Was it your understanding that
3 when you -- well, did you have an understanding at the
4 time you did the photo identification procedure on
5 February --

6 THE WITNESS: 22nd.

THE COURT: -- 22nd as to whether it was proper or most appropriate to do it separately or together?

10 THE WITNESS: At the time or in hindsight?

11 THE COURT: No, at the time, did you have an
12 understanding as to the appropriate way to conduct the
13 procedure, separate or together?

14 THE WITNESS: At the time? Um, I just don't
15 recall what was going through my head.

16 THE COURT: Well, you had been educated to put
17 in your reports what was important, right?

18 THE WITNESS: Yes, your Honor.

19 THE COURT: And do you recall, in Exhibit 1,
20 which is the DEA 6 you prepared on March 2, 2007, you
21 wrote: "During the debriefing, CS-1 and CS-2 were
22 separately displayed a photo array each containing 8
23 images of Hispanic males"?

24 THE WITNESS: I recall writing that, yes.

25 | THE COURT: And did you write "separately"

1 because you understood there was some importance to
2 whether the photo identification procedure was conducted
3 separately with each?

4 THE WITNESS: I wish to convey that there were
5 two separate arrays and there was --

6 THE COURT: No, my question is different.

7 THE WITNESS: I'm sorry, your Honor.

8 THE COURT: You thought it was important
9 enough to make the point that they were separately
10 displayed, the photo arrays.

11 THE WITNESS: I did.

12 THE COURT: Okay. Because you were trained to
13 be, in writing reports, succinct and accurate and to
14 include things that were important and truthful.
15 Right?

16 THE WITNESS: Yes, your Honor.

17 THE COURT: And you wrote that "They were
18 displayed a photo array each containing 8 images."

19 THE WITNESS: That's what I wrote, your Honor.

20 THE COURT: In retrospect, would it have been
21 more accurate for you to have written that the
22 identification procedures were conducted with CS-1 and
23 CS-2 together and they were each displayed duplicate
24 photo arrays, each containing 8 images of Hispanic
25 males?

1 THE WITNESS: That would have been more
2 accurate. I ought to have used another -- well, I
3 wanted to express that they were simultaneous, but they
4 weren't physically looking at the same array. I ought
5 to have written more appropriate verbiage to convey,
6 both accurately and truthfully, that it was not a photo
7 array, but rather, um, this two distinct photo arrays,
8 and that sentence is in error.

9 THE COURT: You prepared this on March 2,
10 2007, correct?

11 THE WITNESS: I did.

12 THE COURT: And you said that Mr. Connolly had
13 told you -- let me ask you this. Did you prepare any
14 other reports relating to Mr. Ocasio before March 2,
15 2007?

16 THE WITNESS: Um, I'm sure I wrote other
17 reports concerning the arrest before March 2nd. I don't
18 know what those dates are, but I'm sure I wrote some
19 other reports.

20 THE COURT: Do you have those reports here,
21 Mr. Fisher?

22 MR. FISHER: The reports that relate to --

23 THE COURT: Any of the reports that he wrote
24 between February 22 and March 2nd that relate to
25 Mr. Ocasio.

1 MR. FISHER: I don't have the entire -- I
2 don't have the entire discovery file. I'm not sure --
3 there may be. There may possibly be.

4 THE COURT: Well, my question is do you have
5 them in the courtroom?

6 MR. FISHER: No, I didn't bring the entire
7 discovery file, your Honor.

8 THE COURT: Do you have those reports,
9 Mr. Fick?

10 MR. FICK: I do not, your Honor.

11 THE COURT: You don't have them here or you
12 didn't receive them?

13 MR. FICK: I don't have them here, but I've
14 received them, your Honor.

15 THE COURT: Well, either before February 22nd
16 or shortly within a few days thereafter, I think --
17 well, did Mr. Connolly, the prosecutor at that time,
18 tell you to put in a report that Mr. Santos saw
19 Mr. Ocasio in the lockup and told you that he identified
20 him?

21 THE WITNESS: He did.

22 THE COURT: And when did he tell you to put
23 that information in a report?

24 THE WITNESS: I would say initially within
25 days of the lockup identification.

1 THE COURT: Did you testify earlier today that
2 it was either the same day or it was within days
3 afterwards?

4 THE WITNESS: I did. It was either the same
5 day or within days of the incident occurring.

6 THE COURT: Is it your best memory that it was
7 before March 2nd, 2007?

8 THE WITNESS: Yes.

9 THE COURT: And did you put that information
10 in any report including this Exhibit 1 before March 2nd,
11 2007?

12 THE WITNESS: I'm not following you, your
13 Honor. You mean --

14 THE COURT: Did you put the information
15 concerning the identification in the lockup in any
16 written report that you prepared before March 2nd,
17 2007?

18 THE WITNESS: I don't recall that.

19 THE COURT: You don't recall whether you did
20 or not or you don't remember doing it?

21 THE WITNESS: I don't -- I don't recall
22 writing a report concerning the photo identification
23 before March 2nd, no.

24 THE COURT: Okay. I think you're confused,
25 perhaps, by my question.

1 THE WITNESS: I am.

2 THE COURT: Now I'm asking you about the
3 lockup.

4 THE WITNESS: The lockup identification.

5 THE COURT: Yes. Did you put that in any
6 report that you wrote before you wrote this Exhibit 1
7 about the photo identification?

8 THE WITNESS: I don't recall.

9 THE COURT: Do you remember seeing Exhibit 2
10 that was prepared -- could somebody give him Exhibit 2,
11 please.

12 THE WITNESS: I have it, your Honor.

13 THE COURT: Okay. You've got Exhibit 2?

14 THE WITNESS: Yes, your Honor.

15 THE COURT: What date did you prepare that?

16 THE WITNESS: October 29th, 2007.

17 THE COURT: And what caused you to prepare
18 it?

19 THE WITNESS: Um, Mr. Connolly had instructed
20 me to write this report.

21 THE COURT: And is this the report about
22 Mr. Santos identifying Mr. Ocasio in the lockup?

23 THE WITNESS: Yes, your Honor.

24 THE COURT: And did seeing the date of this
25 report cause you to understand that you didn't prepare

1 any report about the identification in the lockup prior
2 to October 29, 2007?

3 THE WITNESS: That's correct.

4 THE COURT: Did you understand that if
5 Mr. Santos had seen Mr. Ocasio in the lockup, that could
6 taint, injure -- meaning injure the reliability of the
7 identification he made concerning the photo array?

8 THE WITNESS: I understand that now, your
9 Honor.

10 THE COURT: Did you understand it in February
11 of 2007? In March of 2007?

12 THE WITNESS: Um, in March of 2007, I did.

13 THE COURT: As of -- did Mr. Connolly tell you
14 that?

15 THE WITNESS: Um, I believe he did.

16 THE COURT: Well, he told you that it was
17 important to put in a report that Mr. -- well, let me
18 see if I can get the chronology. Okay. The --
19 Mr. Ocasio was identified by Mr. Santos to you in the
20 lockup around 9:45 in the morning. Is that right?

21 THE WITNESS: Yes. February 22nd.

22 THE COURT: And the photo identification
23 didn't occur until about what time in the afternoon?

24 THE WITNESS: As it says on this report, on
25 Exhibit 1, your Honor, 1:25 p.m. on February 22nd.

1 THE COURT: All right. And between the
2 identification and the lockup and the conversation you
3 had with Mr. Santos and the presentation of the photo
4 array at about 1:30, did you have some conversation with
5 Mr. Connolly?

6 THE WITNESS: I'm sure I did.

7 THE COURT: And did you tell Mr. Connolly --
8 well, the fact that Mr. Santos was able to identify
9 Mr. Ocasio, was that important?

10 THE WITNESS: Yes.

11 THE COURT: And did you tell Mr. Connolly that
12 piece of information?

13 THE WITNESS: I did.

14 THE COURT: And did you tell him that before
15 you did -- and is that the time at which he told you to
16 put it in a report, that that's important?

17 THE WITNESS: The time that I put -- the time
18 I told him about the incident.

19 THE COURT: Well, what did he say to you when
20 you told him that Mr. Santos had identified Mr. Ocasio
21 after seeing him in the lockup?

22 THE WITNESS: He expressed that that was an
23 important event and that I should document that.

24 THE COURT: Did he tell you why?

25 THE WITNESS: I don't recall him telling me

1 why, he just said that it was.

2 THE COURT: Did you tell Mr. Connolly that you
3 were going to present a photo array to Mr. Santos?

4 THE WITNESS: Um, I don't know the sequence of
5 events, but I, at one point during our conversation, I
6 told him that I was.

7 THE COURT: Was that before you presented the
8 photo array?

9 THE WITNESS: The conversation? Oh, I told
10 him before I was going to show him -- I believe I did.
11 Um, I don't know if -- I don't know if it was that day
12 or days earlier. I just don't recall.

13 THE COURT: And why didn't you put the
14 important information about Mr. Santos seeing and
15 identifying Mr. Ocasio in the lockup in this report
16 prepared March 2, 2007, which is Exhibit 1?

17 THE WITNESS: Why did it take me so long?

18 THE COURT: No, why didn't you put that
19 information in this report? Let me take a step back to
20 make sure you understand.

21 Exhibit 1 talks about the presentation of the
22 photo array, correct?

23 THE WITNESS: It does.

24 THE COURT: It doesn't say anything about the
25 identification in the lockup, isn't that correct?

1 THE WITNESS: No, it does not.

2 THE COURT: Why didn't you put anything about
3 the identification in the lockup, which you had been
4 told by Mr. Connolly was important and had to be
5 documented, in this report?

6 THE WITNESS: Because that was a separate
7 event that occurred. It just occurred at a different
8 time. Um --

9 THE COURT: Does the DEA have standard
10 procedures and/or practices as to how quickly DEA 6
11 reports are to be prepared?

12 THE WITNESS: Yes.

13 THE COURT: What is the DEA practice and
14 procedure required in February of 2007?

15 THE WITNESS: My recollection from my training
16 in Quantico was that reports are to be prepared within 5
17 -- within 5 days to 7 days, depending on what type of
18 report it is.

19 THE COURT: So is it correct for me to
20 understand that the report that's Exhibit 2, the one
21 dated October 29, 2007, should have been prepared no
22 later than 7 days after February 22nd, 2007?

23 THE WITNESS: That would be accurate.

24 (Pause..)

25 THE COURT: Why didn't you prepare that report

1 until October?

2 THE WITNESS: I had forgotten. I had other
3 duties that I was involved in and, um, I thought I had
4 prepared it.

5 THE COURT: And what prompted -- I'm sorry?

6 THE WITNESS: Um, I thought I had prepared it,
7 but in looking in the case file, it was clear that I had
8 not.

9 THE COURT: And what prompted you to prepare
10 it in October?

11 THE WITNESS: I had a conversation about
12 discovery issues that I had with the U.S. Attorney's
13 Office and I recalled, during that conversation, that I
14 hadn't created the file concerning the photo -- excuse
15 me, the lineup or rather the lockup -- the marshals'
16 lockup identification.

17 THE COURT: Who did you speak to about that in
18 the U.S. Attorney's Office?

19 THE WITNESS: I don't recall it -- if it was
20 Mr. Connolly. I know we discussed discovery matters.
21 And based upon that conversation, I recall that
22 Mr. Connolly instructed me to write the report.

23 (Pause.)

24 THE COURT: Have defense counsel revised their
25 view about not wanting to ask any questions?

1 MR. FICK: No, your Honor.

2 MR. GARRITY: No, your Honor.

3 THE COURT: Mr. Fisher, are there more
4 questions you'd like to ask at this point?

5 MR. FISHER: I have no further questions for
6 the witness, your Honor.

7 THE COURT: All right. Well, we're going to
8 take a recess. Mr. Fisher, I'm ordering that you go
9 through your files during the recess. If there are
10 reports between the dates of February 22nd and March
11 3rd, I want you to deliver them to my chambers.

12 MR. FISHER: Your Honor, just to be clear.
13 Reports that were drafted between those dates or that
14 had to do with something that occurred between those
15 dates?

16 THE COURT: I would say drafted between those
17 dates. Well, actually, I would say both.

18 MR. FISHER: Okay.

19 THE COURT: I'm interested in that. And if
20 you find anything else, written down or not written
21 down, including anything from Mr. Fay about the
22 identification procedure, I'd like to have that, too.
23 So I'm going to order that you ask one of your
24 colleagues to get you a sandwich and you look at this
25 and get it to me by about 2:00 and I'll see you all

1 again at 2:30. Okay? And at that point I'll decide
2 whether I can act on this matter orally or whether I
3 need to take it under advisement. Okay? Thank you.
4 The Court is in recess.

5 And, Mr. O'Shaughnessy, you'll have to come back,
6 when we come back at 2:30. If I get some more
7 documents, I may have a few more questions.

8 THE WITNESS: Yes, your Honor.

9 THE COURT: Thank you.

10 (Lunch recess, 11:00 a.m.)

11 (Resumed, 2:30 p.m.)

12 THE COURT: We have all counsel and
13 Mr. Ocasio.

14 About 25 minutes ago, I got a letter dated June 5,
15 2009, which will be docketed. But, Mr. Fisher, would
16 you like to report on what you've done since we took the
17 break and what you've provided?

18 MR. FISHER: Your Honor, what I did was I went
19 back up to my box of previously provided discovery and
20 the original, at least my copy of the original DEA 6s,
21 and other reports such as drug lab reports and other
22 things that Agent O'Shaughnessy may have reviewed and
23 signed and I went through those for the dates, February
24 22nd through March 3rd. I also reviewed all the reports
25 to see if there were any, either signature dates or I

1 was really looking for the date prepared. One thing
2 that since I -- about 3 or 4 minutes ago I was speaking
3 to Attorney Garrity and Attorney Fick and there's a
4 report which I looked at dated February 1st of '07, so
5 --

6 THE COURT: Well, let me ask you this. Have
7 you provided them what you provided me?

8 MR. FISHER: Everything I provided except for
9 my letter. I provided -- they have all the previous --
10 that was all Bates stamped for them, the previous --

11 THE COURT: Well, I'll read the letter. You
12 can't communicate with the Court without defense counsel
13 knowing you're communicating.

14 MR. FISHER: Sure. This report that was
15 brought to my attention by my brother, the last
16 paragraph, even though the date prepared was February
17 21st, '07, it mentioned Mr. Ocasio being transported
18 here on February 22nd. So -- and the reason I missed
19 that is because I was looking at date prepared and the
20 date it was prepared was --

21 THE COURT: That's fine. Why don't you give
22 me a copy of it.

23 (Hands up.)

24 MR. FISHER: And as I stated in my letter, I
25 didn't have the opportunity, also, after reviewing --

1 THE COURT: Stop. I want to read it.

2 MR. FISHER: Oh, sure.

3 THE COURT: (Reads.) Which paragraph refers
4 to the 22nd?

5 MR. FISHER: It's the last paragraph, your
6 Honor, on the last page.

7 THE COURT: (Reads.) All right. Well, the
8 letter states: "I have spoken with TFA Kevin Swift and
9 TFA James Fay. They both reported to me that they
10 drafted no notes and submitted no reports. TFA Swift
11 has almost no recollection of the identification that
12 occurred in the lockup. TFA Fay had no exculpatory
13 information to report. He stated that he has a limited
14 memory as to what occurred at the coffee shop
15 identification, but remembers that both cooperators were
16 sitting next to each other with two separate tables
17 approximately 3 feet apart. He also remembers that each
18 cooperator had their own copy of the photo array."

19 Now, I've looked at the reports quickly. I didn't
20 want to keep all of you waiting a long time. Is there
21 anything inconsistent in these reports with the
22 testimony I heard today?

23 MR. FISHER: None that I came across, your
24 Honor. I read them again. The reason I pulled them out
25 is because they fell into that pertinent time period.

1 THE COURT: All right. And I note that Agent
2 O'Shaughnessy prepared or signed a good number of
3 reports after March 22nd and before -- in the next
4 couple of weeks after that, and none of them included
5 the important information, some of it helpful to the
6 government, some of it very helpful to the defendant,
7 about the encounter and identification in the lockup.

8 Does the DEA have its own Inspector General or
9 Office of Professional Responsibility or does it rely on
10 the Department of Justice Inspector General? Do you
11 know?

12 MR. FISHER: I do not personally know that.

13 THE COURT: Well, let's bring
14 Mr. O'Shaughnessy in because I think it's fair and
15 appropriate that he hears what I have to say. But I'll
16 ask him.

17 MR. FISHER: Do you want him back on the
18 stand, your Honor?

19 THE COURT: It's not necessary.

20 (Mr. O'Shaughnessy enters.)

21 THE COURT: Mr. O'Shaughnessy, why don't you
22 come up here with Mr. Fisher, please.

23 Mr. O'Shaughnessy, do you know whether the Drug
24 Enforcement Administration has its own Inspector General
25 or Office of Professional Responsibility rather than

1 relying on the Department of Justice's?

2 THE WITNESS: It does, your Honor.

3 THE COURT: It does. All right. Well, is
4 there anything anybody would like to say before I orally
5 decide this request to dismiss the charges against
6 Mr. Ocasio?

7 MR. FICK: No, your Honor.

8 THE COURT: Well, since we broke for lunch, I
9 have received the information and additional documents
10 transmitted with Mr. Fisher's June 5, 2009 letter, which
11 will be filed. Or actually I'll just make it the next
12 be, Exhibit 5.

13 (Exhibit 5, marked.)

14 THE COURT: As I said before he came in, there
15 are a number of reports that Mr. O'Shaughnessy prepared
16 or signed shortly after February 22, 2007, none of them
17 include what he was told by the prosecutor then in
18 charge of the case was important information about the
19 encounter between Mr. Santos and Mr. Ocasio and the
20 identification by Mr. Santos of Mr. Ocasio in the
21 lockup. Mr. Fisher reports that he had spoken to
22 Officer Fay who recalls that, for the photo ID, both
23 cooperators were sitting next to each other at two
24 separate tables approximately 3 feet apart.

25 The exculpatory evidence or the evidence helpful

1 to the defendant, the government had a duty -- including
2 for Mr. Fay, the government had a duty to provide,
3 before May 27th, 2009, when we conducted the scheduling
4 conference -- on May 27, I specifically ordered the
5 government to contact all participating agencies to
6 determine if there was exculpatory information,
7 including statements inconsistent with those
8 Mr. O'Shaughnessy had made. The government did not do
9 that. As I said earlier, a duty and then an order were
10 violated. But I have limited time and resources to deal
11 with government errors or even misconduct.

12 This is not a case, I find, in which it would be
13 appropriate or really feasible to deny the requested --
14 to deny the request for leave to dismiss. So I will
15 issue an order granting leave to dismiss the charges
16 against Mr. Ocasio. The order will also require the
17 acting United States Attorney, Mr. Loucks, to read the
18 transcripts of May 27th and today and to certify to me
19 that he has done so.

20 This demonstrates to me, once again, that better
21 training of Assistant United States attorneys regarding
22 the **Brady** responsibilities and the local rules are
23 needed. As I said repeatedly, had Mr. Fisher made
24 earnest and, in some respects, effective efforts to
25 disclose exculpatory information, however, those efforts

1 were inadequate and incomplete, which would not have
2 been the case if the local rules had been properly
3 understood and obeyed.

4 Local Rule 116.9 codifies the obligation of
5 participating agencies and law enforcement officers and
6 prosecutors to preserve their notes. The purpose is, in
7 part, to assure that they can be reviewed for
8 exculpatory information and produced. Local Rule 116.8
9 says what **Kyles** requires: "The attorney for the
10 government shall inform all Federal, state and local
11 enforcement agencies formerly participating in the
12 criminal investigation that resulted in the case of the
13 discovery obligations set forth in these local rules and
14 obtain any information subject to disclosure from each
15 such agency." As I explained earlier, the U.S.
16 Attorney's manual has the same direction.

17 However, here, all agencies involved in the
18 investigation, at least until the lunch break today,
19 have not been asked for exculpatory information.
20 Moreover, all notes had not been -- well, it hadn't been
21 determined whether there were notes that existed to be
22 reviewed for exculpatory information. This case
23 involves yet another instance of a delayed disclosure of
24 important exculpatory information.

25 The failure to discern that information and

1 produce it earlier had severe potential consequences for
2 Mr. Ocasio and, I would infer, had some actual
3 consequences. He's had a prosecution hanging over his
4 head and the threat of a long stretch in prison in a
5 case that when the government produced information, some
6 of which was due 42 days after the arraignment in 2007,
7 that if it had been produced in a timely manner, the
8 human anxiety of facing charges like these and a
9 potential long sentence would have been ended a long
10 time ago.

11 I'm also ordering the Acting United States
12 Attorney to provide my relevant orders in the May 27th
13 transcript and the transcript of today's proceedings to
14 the Special Agent in charge of the Drug Enforcement
15 Administration Office in Massachusetts and to the Drug
16 Enforcement Administration Inspector General. That is
17 another matter that the Acting United States Attorney
18 will have to certify has been done.

19 I do not find that Mr. O'Shaughnessy deliberately
20 lied in his report or in his testimony today. I am
21 skeptical about whether the two cooperated witnesses
22 were really 5 to 6 feet apart, as he testified, rather
23 than shoulder to shoulder, as I find that he told
24 Mr. Fisher before Mr. Fisher wrote that to Mr. Ocasio's
25 counsel.

1 However, at a minimum, the DEA 6 report that's
2 Exhibit 1 regarding the photo identification process is
3 misleading. Mr. Fisher, the prosecutor, recognized this
4 and he disclosed it. It's misleading in an important
5 way. It's misleading in a way that might have made a
6 difference to the outcome of the motion to suppress.

7 The DEA 6 report that's Exhibit 2 was prepared 8
8 months after an important event, the encounter in the
9 lockup between Mr. Santos and Mr. Ocasio. Mr. Santos's
10 identification of Mr. Ocasio in the lockup, which
11 occurred before the photo identification occurred, that,
12 as the government recognizes, is also material to the
13 issue of the admissibility of the photo identification
14 and the government properly recognized that, in the
15 circumstances, the photo identification was not reliable
16 and could not be used in evidence. But even that
17 belatedly prepared DEA 6 was disclosed very late. It
18 was disclosed 10 months after it was prepared, 18 months
19 after the event, about 16 months after the local rule
20 required the disclosure of material exculpatory
21 information relating to a foreseeable motion to
22 suppress. At a minimum, those DEA 6 reports, Exhibits 1
23 and 2, reflect the failure of DEA to properly train and
24 supervise with regard to identification procedures and
25 writing reports.

1 However, dismissal is not appropriate under the
2 standard stated by the Supreme Court in **Rinali vs.**
3 **United States**, 434 U.S. 22 at 30, Note 15. I find that
4 the dismissal has not been requested for the purpose of
5 harassing Mr. Ocasio. The dismissal is with prejudice
6 with regard to the Federal government. The Federal
7 government will not prosecute Mr. Ocasio for the events
8 relating to the charges against him in this case. It's
9 been represented, I think reliably, that the State is
10 not likely to prosecute Mr. Ocasio. Mr. Ocasio wants
11 the dismissal.

12 I also find that the motion to dismiss is not
13 prompted by considerations clearly contrast -- clearly
14 contrary to the public interest. I find, more
15 specifically, that there are mixed motives for the
16 request for leave to dismiss. In its present posture,
17 this case would be difficult for the government to prove
18 beyond a reasonable doubt. The identification of
19 Mr. Ocasio, by two cooperating witnesses, Mr. and
20 Mrs. Santos, is inadmissible, as the government
21 recognizes. Another witness against Mr. Ocasio is
22 co-defendant, Mr. Farias, who the government now
23 believes is not credible with regard to his, Farias's
24 evidence against Ocasio. It's been represented to me
25 that other witnesses contradict Mr. Farias.

1 As far as I know, the principles of Federal
2 prosecution still provide that the Department of Justice
3 should not prosecute a case unless it believes the
4 admissible evidence is likely to be sufficient to prove
5 the charge beyond a reasonable doubt. The prosecutor's
6 understanding of the evidence has evolved and it's
7 appropriate to actually encourage prosecutors, when they
8 view the evidence differently than they did at the time
9 the case is indicted, to consider further whether
10 prosecution meets that standard and if not to request
11 dismissal. So, as I say, that's an appropriate and
12 indeed desirable course.

13 I also find that the request to dismiss was
14 motivated in part by a desire to keep possible
15 misconduct by a DEA agent from being explored and
16 perhaps exposed in court in the suppression hearing that
17 was scheduled for today. If a cover up of government
18 misconduct were the sole motive for putting an alleged
19 drug dealer back on the street -- is what's happening
20 here, I would resist.

21 As I wrote most recently on May 18, 2009 in my
22 **Jones** decision: "Criminal prosecution is not a game.
23 It's not -- the Federal court is not like the National
24 Basketball Association where sometimes the referees are
25 said to reason, 'Well, no harm, no foul.'" I would not

1 want the dismissal of this case to abet the possible
2 misunderstanding that if there are serious errors or --
3 although I don't find, in this case, intentional
4 misconduct, but if there is intentional misconduct, if
5 it's revealed, the case can just be dropped and they'll
6 be no consequences for the human beings who represent
7 the government in that case.

8 However, the testimony I heard this morning has
9 developed certain facts. The Department of Justice and
10 the Drug Enforcement Administration can consider whether
11 any further education for Mr. O'Shaughnessy or others,
12 regarding identification procedures and reports, is
13 necessary or appropriate. The Department of Justice and
14 DEA can consider whether any discipline is necessary or
15 appropriate.

16 As I discussed in that May 18 **Jones** decision, my
17 experiences, painful, repeated experiences have caused
18 me, with regret, to become quite skeptical about the
19 capacity of the Department of Justice to deal
20 effectively with matters of serious errors or
21 intentionally misconduct. However, as I also said in
22 the **Jones** decision, Attorney General Holder, who is now
23 a relatively new Attorney General, has expressed a
24 determination to improve the Department of Justice's
25 performance in these matters. The Acting United States

1 Attorney, Mr. Loucks, has echoed that determination and
2 I believe, with many of his assistants, really does not
3 want these issues to recur. These are matters primarily
4 for the Department of Justice to be able to, in a
5 renewed effort, to minimize the risk of their
6 recurrence, which is far too frequent.

7 So my order will require the United States
8 Attorney to order the transcript on an expedited basis.
9 I will give him until June 19 to read it, to certify to
10 me that he's read it, to certify to me that he's sent it
11 to the Drug Enforcement Administration's Special Agent
12 in charge of the Boston office and the Drug Enforcement
13 Administration's Inspector General. I will provide it
14 to Judge Douglas Woodlock and Magistrate Judge Leo
15 Sorokin who will be organizing, or are organizing the
16 seminar for prosecutors, defense lawyers and judicial
17 officers that arises out of my **Jones** case. I have
18 provided a schedule for the filings with regard to
19 Mr. Farias. I'll wait for those filings and either
20 sentence Mr. Farias in August or deal with any motions
21 that are presented.

22 Is there anything further in this matter for
23 today?

24 MR. FISHER: No, your Honor.

25 MR. FICK: No, your Honor.

1 THE COURT: The Court is in recess.

2 (Ends, 3:10 p.m.)

3

4 C E R T I F I C A T E

5

6 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do
7 hereby certify that the foregoing record is a true and
accurate transcription of my stenographic notes, on Friday,
June 5, 2009, before Chief Judge Mark L. Wolf, to the best
8 of my skill and ability.

9

10 /s/ Richard H. Romanow

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12 RICHARD H. ROMANOW

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